THE SHIP OF STA.

The Essentials of Political Science

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CONTENTS

CHAPTER I

Introductory

IT may be a prosaic, but it is certainly not an unpractical, argument with which to emphasize the importance of the subject-matter of this book, to remind the British taxpayer that the State, in the financial year 1937-8, cost him over eight hundred and fifty million pounds It is not, of course, suggested, at any rate at the present stage, that the taxpayer did not get full value for his money But, inasmuch as the total income of the same taxpayer for the same year was not much more than five milliards of pounds, it is clear that the average amount taken by the State from the British taxpayer is not much less than a sixth of his come

But there is a quality in this levy which is almost more important than its quantity.

It is quite true that, in a democratically governed country, the taxpayer can only be called upon to contribute to the State's revenue to the extent to which his elected representatives have, directly or indirectly, authorized the State to levy upon him. But, apart from the fact that, in all so-called democratic countries where there is real electoral freedom, there are a considerable number of persons who have, on any given occasion, voted against the Government which actually proposes and carries the taxation demanded, there is one very important feature in the operation of the State which distinguishes it, not only from the possibilities open to any individual, but also from any institution, or group of institutions, other than the State itself

This is the feature, claimed by every State, that, within

its own territorial sphere of operation, it allows of no physical opposition to any of its demands, and, in fact if not in form, it considers the exercise of physical force by any individual or institution other than itself, except under its own authority expressed or implied, as a challenge to its existence. Put in the tersest form, this feature is expressed in the well-known aphorism "The State is power" (*Der Staat ist Macht*); and though, like most aphorisms, this sacrifices completeness to brevity, it contains an important element of truth. For, however carefully a nation or political community may safeguard the processes by which the State to which it professes its allegiance expresses its authority, no nation is willing to admit, either to its own members or to outsiders, any limits to the properly expressed authority of that State.

Furthermore, it may well be that the ordinary modern individual may find himself bound to reckon, not only with the State to which he owes allegiance, but also with other States in whose territories he may happen to find himself by the accident of travel, or with whose lieges he may carry on business. Here, likewise, he will find, in any of these cases, that he is dealing with a power which may be benevolent and friendly, but which, on the other hand, may be quite the reverse in its attitude towards him—irrespective of his own attitude or feelings. And, in all these cases, he will find that, at least so far as his individual action is concerned, he is up against an authority which acknowledges, at least to him, no limits to its powers of action.

Once more, as a distinguished English author has only recently pointed out,[1] it is a peculiarity of this power or authority which is so striking a feature of State action, that, in spite of the institutional character of the State, it is an influence which, in the long run, can only be exercised over individual human beings. We speak of a State as, for example, maintaining an army or building fortifications.

[1] *Power, A New Social Analysis*, by Bertrand Russell George Allen & Unwin, 1938

But what we really mean is that, as a result of a long and elaborate process of discussion and action, certain individuals, who are certainly not "the State," appear in certain places and perform certain acts, and that, apparently, there are no limits, other than the limits of sheer physical impossibility, to the results which these individuals may achieve.

Finally, as the distinguished writer to whom allusion has just been made, also points out, it is a distinguishing feature of the human, as distinct[1] from the animal, world, that the former appears liable to internal impulses which cause its members to seek opportunities for exercising authority of various kinds over its fellow human beings, not only in the political, but also in religious, economic, social, and other spheres of activity.[2] It may well be that, in many instances, such exercise of authority may work for the obvious good of the individuals over whom it is exercised, or even, though this is less probable, of those who exercise it. But it is fairly clear that if two individuals, or two groups of individuals, conceive, simultaneously, impulses towards the reciprocal exercise of authority over one another, there is bound, human nature being what it is, to be a conflict of wills, with potential consequences of a disastrous kind. It is this which makes the existence of national States so important, and a world at present dominated by them so much like a powder magazine

There is, therefore, little necessity to search for an excuse to study from different angles the institution, or group of institutions, known as "the State" It is quite true that, until a few years ago, there was an influential body of thinkers who attributed most of the suffering and discontent in the world to the existence of this very institution,

[1] Russell, *op cit* Chapter I (It is an obvious explanation of the distinction, that the purely animal brain has not yet acquired the capacity for realizing the advantages which might accrue to its owner by the exercise of such authority)

[2] It should be carefully noted, that Bertrand Russell expressly describes his brilliant work as a "new *social* analysis" Of course it covers a far wider ground than these modest pages

and cheerfully looked forward to its speedy disappearance. It is somewhat remarkable that, in fact, in recent years little has been heard of this view, and that the trend of actual events has been the other way. But, whichever view be right, it is an essential preliminary to arriving at a conclusion, that we should understand something of the nature of the State, of the events which brought it into existence, of the forms which it assumes, of the functions which it performs, and the possibility of its modification.

CHAPTER II

The Nature of the State

FOR some three hundred years the word "State" has been used in English political science to signify the institution, or group of institutions, which is entrusted with the government of a community known as a "Nation." This use is, of course, only an example of the common practice of the specialization, for limited purposes, of a word with a much wider connotation, covering almost any condition of permanency.

THE STATE AN INSTITUTION

An institution has, in itself, no material existence It is a valuable achievement of the human mind, whereby a purely intellectual concept provides for the performance by individuals of functions which, it is anticipated, will, from time to time, require to be performed, not necessarily in the interest of the individuals performing them, but, it may be, in the interest of some wider body of persons who, it is assumed, may be affected by their performance. One of its most valuable qualities is that it is, or, at any rate, may be, unlimited by the ordinary span of human life In fact, the ordinary legal attribute of a corporation, one of the commonest of institutions, is that it has a "perpetual existence."

It is, therefore, not difficult to trace the process by which the term "State," the root notion of which is, as has been said, stability or permanence, became peculiarly attached to the institutions of government, not only in England but

in many other European countries. No doubt, the peculiar circumstances of post-Conquest England, in which, for centuries, the personality of the monarch was the determining factor in most matters of government, delayed the recognition there of the State as an institution. Even the vital step taken by Edward Longshanks in 1273, when, being abroad at the time of his father's death, he calmly assumed that his own writ ran in England from that date, was not at first seen in its full significance. Perhaps Sir John Fortescue, in his *Governance of England*, written towards the end of the fifteenth century, helped a good deal towards enabling the English public to grasp the distinction between the State as an institution and the individuals who from time to time wielded its authority. Whether this was his intention, it is difficult to say.

At any rate, from the early years of the sixteenth century, the word "estate," long familiar to the English public as denoting a particular interest, or class of interests, in land, began to be specially associated with ceremonies and symbols of the King's Court Perhaps to distinguish it from the legal interests in land just alluded to, the initial letter was dropped; and the word "state" took its place. This use of the word is familiar in Shakespeare's plays; and we need not be surprised to find that Shakespeare, the timeless genius, even anticipated the modern purely objective use of the term to cover the institutions of government generally.[1] But, before reaching this stage, the word passed through various intermediate stages in which it appears rather as a qualification than an institution. By the end of the sixteenth century, there appears the Queen's "Principal Secretary of State (or Estate)"; and, though the Commonwealth Constitution of 1653 rejected the royalist associations of the term "Privy Council," it did not hesitate to set up a "Council of State." Indeed, the

[1] *Othello*, v ii, 354, "traduced the State" There is no reason to suppose that Shakespeare used the word in the incorrect and unhistorical sense to mean the members of the nation or community

word "State" gained at the expense of what looked, at one time, to be a formidable rival, viz the "Commonwealth," which, at the restoration of the monarchy in 1660, became suspect for its Puritan flavour, and has only within the present century regained something of its former popularity as a democratic description of the British Empire. But it was not until the Ministers of the Crown, in the debates which ensued on the introduction of the Official Secrets Act of 1889, had succeeded in dissipating the suspicion that, in seeking to protect the "interests of the State," they were really seeking to protect their own personal interests, that the word "State" may be regarded as having received its official baptism in England

It is necessary to refer somewhat carefully to the other implications of the State, regarded as an institution or group of institutions As has been said, the term, in this sense, is confined to the institutions of government of a special type of community which bears the name of "Nation." It is, therefore, essential to say something of the nature of a national community, or "Nation"

WHAT IS A NATION?

The word "community" naturally implies a number of individuals having interests in common; being thereby distinguished from a mere chance crowd or aggregate of human beings, such as is attracted by any alarming rumour or portent But as to the nature of such interests, and the methods by which they are pursued, there is room for a good many difference of opinion, which have been carefully discussed by a learned writer in a book published in the year 1917.[1]

[1] *Community, a Sociological Study*, by R M MacIver Macmillan Despite the fact that the learned author, in a subsequent work (*The Modern State*, Clarendon Press, 1926) arrives at a conclusion as to the nature of the State with which the present writer cannot agree, he (the writer) desires to bear cordial testimony to the value of Prof MacIver's studies

It is, however, clear, that not every aggregate of persons having interests in common is a community of the kind which is recognized as a "Nation"—for example, an ordinary commercial partnership, or the inhabitants of a township, though these bodies have not only common interests but common activities. It would appear that at least three other features are necessary to entitle a community to rank as a nation

The first of these, and perhaps the least important, is the feature of size or numbers. Montesquieu's well-known demand, that a nation must include "many families," is not only inadequate but misleading; for it tends to suggest that, as is sometimes urged by inexact speakers and writers, "the State (or the Nation) is an enlargement of the family." No one who considered carefully the different functions performed by the family and the nation, or the manner in which these two kinds of communities have, within historical times, come into existence, could possibly fall into such an error. Indeed, it would hardly be incorrect to say, that the Nation has, to a large extent, assumed its present importance by limitation, if not by actual suppression, of the functions of the Family. The basis of the Family is kinship, not political allegiance, which is, at the same time, both less and more than kinship. All that the demand for a minimum limit of the size of a nation in practice amounts to is, apparently, that no community which is incapable, by reason of its lack of numbers. of fulfilling the obligations of international intercourse, would be accorded the rank of a nation. Of the maximum limits of a nation there has never been any question.

A second feature which is, at the present time, regarded as essential to the status of nationhood is the control of a definite territorial area, which includes, in the case of nations with sea borders, a somewhat vague area of the ocean-bed beyond high-water mark This area, commonly known as the "three-mile limit," is said to have been chosen, at some vague date, as representing the area which

could be controlled by gunfire emanating from the coastal territory; but there is one conspicuous dissident from this view, in the case of Spain, which claims a coastal territorial limit of seven miles. Obviously, the questions involved are of international as well as of national interest, because any claim by a single nation to claim exclusive control of any part of the high seas is, *primâ facie*, inconsistent with the view, accepted by all civilized communities, that the bed of the ocean, or, at any rate, the water above it, is *res nullius*, i e incapable of appropriation by any community. In the present imperfect position of international law, the question of coastal limits cannot be regarded as entirely free from doubt So far as Great Britain is concerned, however, the view was officially stated by the Government of 1928 in its reply to an inquiry directed on behalf of the League of Nations,[1] which claimed definitely the exercise of British "sovereignty" over a belt of territorial waters of three (marine) miles

The appearance, in this passage, of the mystic word "sovereignty" raises, inevitably, the question of the nature of the control which a nation claims to exercise over the territory which it asserts to be its own. Like the word "State" itself, it is an instance of the specialization, for a particular purpose, of a term which once had a wider connotation Philologically, the word "sovereign" is merely an adoption of a Latin word (*supremus*), which signified little more than primacy or pre-eminence In the later Middle Ages, it was freely applied to any conspicuous or important person For example, the Heads of Colleges in Oxford or Cambridge are described in some law reports as "sovereigns."

Unfortunately, the Wars of Religion which devastated Europe during the sixteenth and early seventeenth centuries, raised the discussion of "sovereignty" to an exaggerated degree of importance, which has had the most

[1] The text is reproduced in *Great Britain and the Law of Nations*, by Prof H A Smith, Vol II, p 129 P S King & Sons, 1935

unfortunate results. Before the religious Reformation of the sixteenth century took place, the nations of Europe were accustomed to regard as a moderating power the authority of the Pope of Rome and the Holy Roman Emperor—i.e. the monarch who, for the time being, was supposed to exercise the role of universal ruler formerly in fact exercised by the Roman Emperors of the first four centuries after Christ.[1] This ancient Roman Empire, or, at least, the European part of it, had, of course, been swept away by the invading hosts from east of the Rhine in the fifth century after Christ. But its existence had left a profound impression on the memories and imaginations of the mixed peoples who had emerged in Western Europe from the chaos of the barbarian invasions ; and, now and again, some great event like the discovery of the genuine texts of the old Law Digest and Codes of the Emperor Justinian, would awaken a longing for the revival of a supreme secular authority which, like the old Roman Emperors, should rule the world in peace and law-abidingness. Meanwhile, however, the destruction of the old Empire of Rome had led, in the middle of the fifth century, to the emergence of the spiritual supremacy of the Bishops of St. Peter's in that city ; and it was not to be expected that these rulers, whose spiritual authority extended throughout Western Europe, would be content to abdicate before a purely secular ruler, who wielded the sword of the flesh and not the sword of the spirit.

THE HOLY ROMAN EMPIRE

As is well known, the difficulty was overcome by the application of a convenient text of Scripture which spoke

[1] The fascinating story of this political legend is told with masterly skill by the late Lord Bryce, in his little work entitled *The Holy Roman Empire* (enlarged and revised edition, Macmillan, 1904). The Holy Roman Empire was not formally abolished till 1805 ; but it had ceased long before then to be more than an honorific title.

of "Two Swords," and its adaptation as the basis of a compromise. Pope Leo III had the wisdom to realize that the victorious Charles the Great, the orthodox Christian leader of the Austrasian Franks, was more desirable as a friend and partner than as a rival; and, by crowning Charles in St Peter's on Christmas Day of the year A D 800 as Holy Roman Emperor,[1] he set up that curious *condominium* which, as has been said, exercised, with varying effect, a vague international authority over Western Europe till the middle of the sixteenth century. But with the rapid progress of the Protestant Reformation in that century, and the alignment of Europe into two hostile camps it became manifestly impossible for the dual authority of the Pope and Emperor to continue to exercise its moderating influence in international affairs, for the simple reason that no Protestant country would accept the decisions of a tribunal so manifestly Catholic in character.

THE AGE OF GROTIUS

Perhaps the best tribute to the value of the discarded tribunal was the appalling state of affairs which speedily followed its abandonment. The horrors of the Thirty Years' War produced an impression of despair even on the minds of the ruthless soldiers who inflicted them. Before the war was formally brought to an end by the Peace of Westphalia in 1648, a Dutch jurist, Hugo van Groot, whose name was Latinized as "Grotius," had produced one of the great books of the modern world, *Concerning the Law of War and Peace*, which offered at least some solution of the hideous anarchy which was devastating Europe. Being both a Protestant and a man of affairs, Grotius fully

[1] The mixed character of the new construction long survived in its formal title "The Holy Roman Empire, German by Nation." One of the causes of its long survival was that it was made elective in the tenth century. It is to this fact that the "electors" of Saxony, Hanover, Brandenburg, etc., owed their titles.

realized that the old Catholic tribunal of Pope and Emperor could never be revived as a moderator of the quarrels of even Western Christendom; and, with the insight of genius, he realized also, that no concrete human tribunal could take its place with any hope of general acceptance. He proposed, therefore, to substitute for it the authority of a concept which the recently revived study of Roman Law had made popular in intellectual circles, the concept of a Law of Nature, which he himself defined as the "dictate of right reason," an authority which at least could arouse no feeling of personal rivalry or hatred, and which was, perhaps, capable of being appealed to by each side in a dispute. In order still further to allay jealousies, Grotius postulated an absolute equality before this tribunal of all States exercising *de facto* authority of an unlimited kind over their territories; and, in defining such authority, he dwelt on the absolute independence of its *suprema potestas*, or "sovereignty," both as regards external interference and the internal control of its own subjects.

Shadowy as Grotius' plan must alas! in the light of subsequent history, appear to us, the fact is beyond dispute that its very idealism, no less than its practical recognition of facts, made a powerful appeal to the war-wearied Europe of his day. Famous soldiers are said to have slept with Grotius' book under their pillows, while statesmen and diplomatists gravely quoted from its pages. At least, to anyone with a sense of self-respect, it was a great advance on the ruthless cynicism of Machiavelli, whose *Prince*, written some two hundred years before, had for long been their favourite guide. The Western World acclaimed Grotius as the Father of Modern International Law, a title still accorded to him by serious thinkers.

Unfortunately, the weak points in Grotius' plan soon became apparent. In the absence of a definite and impartial tribunal to expound and apply it, the interpretation of the Law of Nature, or "dictate of right reason," readily lends itself to differences of opinion; and, in insisting upon

the absolute independence of external or internal control enjoyed by each *de facto* national State, Grotius was really favouring a system of international anarchy. Unhappily, the charms of "sovereignty" soon regained their power; and the eighteenth century was as full of wars as its predecessor. Frederick of Prussia, called "the Great," contemptuously repudiated the "dictate of right reason," and frankly adopted the view that what is now called "power politics" was his sole guide. Fortunately, not all rulers imitated his cynical attitude; and it is now admitted by most thoughtful minds, that some moderation of the theory of "sovereignty" is essential if civilization is to be preserved. Fortunately, too, as we shall see, there is no reason for assuming that this exaggerated view is essential to the existence of a national community. On the other hand, it is generally agreed, that such severe restrictions as are imposed on the exercise of control by the acceptance of a "Mandate" from the League of Nations exclude the possibility of considering the inhabitants of the mandated territory as forming part of the national community of the Mandatory Power.

It is, perhaps, hardly necessary to mention, that the subject of territorial control as a feature of nationality has been profoundly extended by the modern development of aviation. Until the end of the nineteenth century, the air, like the high seas, was assumed, both by statesmen and lawyers, to be among the class of *res nullius*, of which no community could obtain exclusive control—not even so much control as is exercised by the passage of a ship on the high seas. Before the end of the Great War, however, it became beyond question clear, that this assumption was fraught with the gravest danger to all civilized communities, and, at the close of the War, by the Air Navigation Convention of 1919 (adopted by some thirty States), it was "recognized" that "every Power has complete sovereignty over the air space above its territory," which was expressly stated to include the "territorial waters" previously de-

scribed.[1] A fuller description of the rights claimed by a State by virtue of its "sovereignty" will naturally be given in the later chapters of this work, in which the activities of a State are considered.[2]

ALLEGIANCE

We come now to the third and last essential of a national community, namely its recognition of the existence of a common government through which its control over a specific territory is exercised. For the full members of the community, this recognition usually takes the form of some definite recognition of allegiance, such as an oath, or claim to take part in public affairs, or the like But the modern law of nationality, not only in England but elsewhere, clearly contemplates the inclusion in the national community of many, probably, in most cases, the bulk of the members of the community, without any formal consent on their part. Broadly speaking, the birth of an individual from parents who, or one of whom, were or was a member of the community at the birth of that individual, automatically makes the latter a member of his parent's nationality, though the rules are, unfortunately, by no means uniform. Some communities go further, and make birth within the national territory sufficient ; some require the double qualification. On the other hand, the old "indelibility" of nationality[3] has been greatly relaxed in modern times ; though, naturally, a nation does not allow one of its members who has taken part in hostile action against it, to escape the consequences of a charge of treason by the simple process of resigning his nationality. Also it must be remembered, that almost every civilized nation shelters, at any given time, within its territory, a

[1] See the quotation given in Prof H A Smith's *Great Britain and the Law of Nations*, previously mentioned, in Vol II, p 140

[2] See especially, *post*, caps VII-VIII

[3] Expressed in the maxim *Nemo potest exuere patriam*

considerable number of individuals who are not members of its community, but, as "aliens," are given a greater or less share of its protection to enable them to live their private lives in security But, as a rule, such persons are excluded from any share in public office in their adopted community, in many cases they are subject to certain disciplinary restrictions, and, in practically all cases, they are subject to the ordinary laws (including the criminal law) in force for the time being in the country of their residence, though they are, on the other hand, entitled, to a limited extent, to the diplomatic protection of the national community to which they actually belong, and, in a decreasing number of cases, to large immunity from the jurisdiction of the State whose territory they inhabit.

This recognition of the existence of a common government by the members of a national community is of vital importance in the working of a political system, because it implies the existence also of that co-operative element, which, with the other element of authority, constitutes the essential character of government, which, as stated at the beginning of this chapter, is the business of the State. But the word "nation," and its derivatives, suggest, philologically, some connection with the biological element, of which a good deal has lately been heard, and which threatens seriously to disturb both the practice of government and the theory of the State This is the so-called "racial" element, which, if the reasoning of this chapter is sound, has no essential place in political science.

RACIAL THEORIES

Despite the existence of certain important differences of opinion among authorities on biology, there are few persons who would deny the survival among human beings of inherited characteristics, and their persistence for many generations Particularly in connection with speech, religion, and customs, these characteristics are obvious

But here the historian steps in, with his records of migration and inter-breeding of the last thousand years of Europe's disturbed history, which appear to make all theories of racial distribution fantastic. Moreover, the continued existence within defined political boundaries, of clearly marked racial differences, as for instance in the United States of America, Switzerland, and Belgium, seems to show that these differences, given a reasonable amount of mutual forbearance and toleration, are by no means insuperable obstacles to political harmony and national prosperity. Unfortunately, however, they lend themselves only too readily to deliberate schemes of political mischief, both by way of domestic persecution, or even worse, of international interference. Probably, in view of the generally accepted doctrine of "sovereignty," the former is unpreventable; but the latter may, if not carefully guarded against, become internationally dangerous, and lead to a revival of the horrors hitherto associated mainly with the period of the Wars of Religion. In the Dark Ages which followed the downfall of the Roman Empire of the West, when the invading forces were really organized on patriarchal lines, such wars of ideologies were probably inevitable. But, whatever its faults, the political unity of the territorial nation is a great advance on the racial disharmonies of the chaos of the Dark Ages; and to attempt to return to the conditions of those Ages is to aim at a reversal of human progress, which, if successful, would probably herald the downfall of civilization.

Putting it in another way. The true basis of State life is now self-determination; neither doubtful theories of philology, such as "Aryanism," nor cruel prejudices which involve religious persecution, such as anti-Semitism.

CHAPTER III

Origin and Early History of the State

IT was provisionally stated in the preceding chapter, that the State is an institution, or group of institutions, entrusted with the government of a particular type of community known as a "nation" As a compendious summary of the modern view of the State, this statement sufficed for an attempt to describe the nature of the State. But it obviously requires a good deal in the way of examination of the purpose for which this widespread institution exists, viz. government; and it may be convenient to consider this comprehensive purpose under two heads, viz. (1) the nature of government itself, and (2) the chief functions of government which, in practice, are considered to fall properly within the sphere of the State. It is, perhaps, needless to say that, on these two heads, but especially on the last, there are profound differences of view.

WHAT IS GOVERNMENT?

The word "government," judged by its philological derivation, apparently has a close affinity to the rudder, or steering gear, of a ship; and, insamuch as,-in the case of two widely different meanings attached to the same word, that which describes material qualities is probably the older, it may be assumed, without much fear of mistake, that the "government" of a ship was the model from which the government of a nation was borrowed, not *vice versa* This assumption is strengthened by the fact that the equivalent of the word "Governor," to signify the ruler

of a political community, is only to be found in the languages of the nations whose territories border on the sea.[1]

It does not require any expert knowledge of matters nautical to realize that, whilst the destination of a ship is under the control of the steersman, the latter's efforts would be futile unless the crew co-operated in his plans by working the motive power of the vessel (oars, sails, or machinery). And thus the pursuit of the historical analogy leads to the conclusion that its originators regarded government as a combination of two elements, authority and co-operation, not, as in the cruder view, the single element of force. Force alone, i.e. physical force, whether applied or merely threatened, can, of course, do many things. It can, for example, crush rock to powder, drive home a bolt, or compel the peaceful traveller to surrender his purse ; but it would be a misnomer to speak, in such cases, of the rock, the bolt, or the traveller, as being "governed."

TWO ORIGINAL TYPES OF STATE

This view of the essential character of government is borne out by what we know of the circumstances in which the existing States of Western Europe originated. Broadly speaking, these circumstances were of two types

THE FEUDAL TYPE

The first in point of time were those which gradually grew up out of the disorder of the barbarian invasions which brought about the downfall of the ancient Roman Empire. Here the invading hosts settled down as conquerors upon the agricultural and urban populations which had grown rich with the peaceful development of intensive farming and minor industries which had flourished

[1] France, Italy, Spain, Portugal The word appears to be unknown in Germany, but there the word "steuermann" has the double meaning of "steersman" and "taxgatherer," which suggests a similar analogy.

under the long years of the *Pax Romana.* The invaders, whatever may have been their occupations in their native lands, had no wish to take the places of these laborious peasants and artificers. They (the invaders), inured to the hardship and dangers of the long trek, had become, as we should say, soldiers rather than civilians. They were quite prepared to defend their new possessions by force; and, for the most part, they were intelligent enough to realize that it was, on the whole, more profitable for them to live upon the tribute, of various kinds, which they levied upon their new "subjects," or subdued people, while they (the invaders) kept vigilant watch against rivals who might seek to deprive them of their plunder, as well as against revolts by their subjects, rather than to pillage or extirpate these subjects. Their leaders built themselves strongholds to guard against surprise, and quartered their followers judiciously in the typical agricultural villages, and the much less frequent industrial towns, with directions to keep a vigilant eye on the doings of the natives, and to collect the proportion of tribute due from these units to their "lords" Quite naturally, in order to enable them to perform their duties, the "war lords" took care to afford their local representatives special protection, setting a high price on their lives, and enabling them, by their powerful protection, in their turn to become "lords" of their villages and towns This was the origin of the West European landed aristocracy of the Middle Ages, a highly privileged caste, whose typical representative was the fully-armed horse soldier, the "chivalry" (whence the name) of France, Saxony, Bavaria, Lombardy, and Castile, the "tenants-in-chief" of post-Conquest England The relations between them and their agricultural and industrial neighbours are commonly described as the "feudal system"[1]

[1] In practice, the "Holy Roman Emperor" spoken of in the preceding chapter (pp 17, 18) was usually one of the feudal monarchs, though, in theory, any orthodox Christian man was eligible A well-known instance was Richard, a younger brother of the English King, Henry III, elected "King of the Romans" in 1250.

THE NATIVE TYPE

The second type of State which appeared in Western Europe after the barbaric invasions may be described, perhaps, as the "native" State. Substantially speaking, it was to be found in Scandinavia, whither the barbarian invaders from beyond the Rhine had not penetrated, but in which, doubtless, the example of their political development was known. In Scandinavia, which had never been part of the Roman Empire, the country had been settled, somewhat thinly, and in ways of which little is known, by unorganized emigrants (probably from Western Asia) in remote antiquity; and these settlers, winning a scanty livelihood from the rugged soil and the fishing of the fjords and lochs, were, doubtless, largely organized on patriarchal lines. Probably they passed through the various stages of patriarchal life—hunting, nomadic pasturage, and agriculture; and in this latest stage, had no doubt, founded villages, whose headmen, or elders, exercised a kind of paternal government over their own petty districts. But about the ninth century after Christ, they seem to have set to work to copy the institutions of their southern neighbours; and the more adventurous of the patriarchal chiefs had commenced to build up kingdoms by the conquest of neighbouring districts, and the imposition upon them of something in the nature of central authority. Such was the origin of the historic kingdoms of Sweden, Norway, and Denmark, and the sub-kingdom of Iceland, whose kings, in the picturesque language of the *Heimskringla* Saga, subdued all rivals "with scatt, and duties, and lordships." These words describe, aptly enough, the claims established, as we have seen, by the leaders of the barbarian invaders in Central and Western Europe south of the Baltic, whose territories on the landward side were separated from their Scandinavian neighbours by the wide plains of East Prussia, not yet conquered and settled by the knights of the Teutonic Order. Unlike Prussia, or "Borussia," Scan-

dinavia had accepted Christianity some three hundred years before; and the brilliant military energies of Knut of Denmark nearly anticipated the conquest of England by William of Normandy in the eleventh century after Christ. In view of the evidence afforded by Scandinavian land law, it may be doubted whether feudalism attained any great development in Scandinavia.[1]

ARRANGEMENTS AT FIRST PERSONAL

It is fairly clear, from an examination of the contemporary evidence, that the arrangements just briefly described, were regarded by the people concerned as strictly personal to themselves. Resting as they did upon constantly changing circumstances, there was little of permanence about them. Whether, when a war lord fell in battle he was succeeded by another, and, if so, by whom, whether a village or manor which was "in the hand of" Rudolf in a certain year had to pay its tribute to Louis twenty years later, was, as a modern lawyer would put it, "a question of fact in each case" Perhaps the most vivid illustration of this truth lies in the well-known rule that, until the end of the eleventh century or thereabouts, no medieval ruler in Western Europe regarded himself as bound by the grants or charters of his predecessor, until he had expressly confirmed them. Indeed, why should he? As likely as not he had acquired his predecessor's position by a successful war, and it would appear to him absurd to expect that he should recognize the acts of one whom he (the successor) had deprived of liberty, or, it may be, even of life The tenacity with which this view was held on both sides is revealed by the constant demands by the successors of King John for confirmation of the famous English Charter

[1] Readers who desire a closer examination of the foundation of modern Europe than is afforded by the above hasty sketch, may be referred to the author's *Law and Politics in the Middle Ages* Third impression, John Murray, 1915

of 1215, despite the tremendous solemnity which attended its granting.

In other words, the kings and lords of the earlier centuries after the invasion were not institutions, but individuals. When one of them died or was deprived of his position, no one could say for certain who would succeed him. In the case of the greater rulers, though, probably, nothing in the way of a formal election was known, there was some kind of a rough acclaiming or choice among his followers of a new ruler; and there are said to be still some traces of this practice in the coronation service as it is performed at Westminster even to-day.[1] In the case of the lower ranks of the feudal hierarchy, it was long before it was definitely established that their fiefs were hereditary; and, again, there survived into modern English land law some faint ceremonies and liabilities[2] which point back to a time when the heir's admittance to his ancestor's estate was by no means a matter of course. But as the fief, originally an office or jurisdiction rather than ownership, by a process which can be clearly traced in the history of land law, became transmuted into an "estate," or, as we should call it, "property," it became more and more inevitable that customs regulating its transmission should grow up, and all the more so that among the communities which were to become the future nations, such things as inheritance and transmission of property were familiar, and could, indeed, be found elaborately described in the great system of Roman Law under which their ancestors had lived for centuries.

GRADUALLY BECOME INSTITUTIONS

But customs and traditions of this kind are exactly the

[1] The boys of Westminster School are said to play the part of the mailed warriors who acclaimed their new chief

[2] e g. the payment of "reliefs" and the "suing out of livery" incumbent upon the heir on the death of his ancestor

means by which institutions come into existence, i.e. arrangements (to use a non-committal term) which provide for the performance of individuals of functions which, it is assumed, will, from time to time, require to be performed. Thus, for example, the earliest gatherings for discussion and advice summoned by the rulers of the kingdoms founded, as we have seen, as the outcome of the barbarian invasions which broke up the Roman Empire in the fifth and sixth centuries after Christ, were probably spasmodic in character, and only as frequent repetition accustomed the "tenants-in-chief" to regard them as ordinary occurrences, did they develop into the Great Councils which became one of the most important political institutions of the later Middle Ages An even clearer example is the famous Parliament at Westminster, which, summoned by Edward of England in the year 1295, to meet a tremendous crisis, developed with striking rapidity into a frequent gathering of the national representatives, and ultimately, into an institution without whose annual appearance government in the United Kingdom would be impossible It may not be generally known, that no formal enactment (other than a doubtful statute of the year 1330, long since repealed) requires the King to summon Parliament every year But the passing of a year without the assembling of Parliament, at any rate in time of peace, has long been regarded in England as unthinkable.

The overwhelming importance of the Parliament at Westminster, especially when contrasted with the comparative unimportance of the other representative assemblies of Western Europe which appeared about the same time—the *États Généraux* of France, the *Cortes* of Spain, and the *Diets* of Germany—has misled the ordinary Englishman in his attempts to arrive at a clear theory of the State. As a matter of fact, Parliament is not even the oldest of the group of institutions which go to make up the State in England. To say nothing of the Great Council of the Realm, previously alluded to, composed of the tenants-in-

chief, there was, at least a hundred years before the appearance of Parliament, in full working order, an institution known as "the Exchequer," by which a large part of the government of the country was carried on, and which still plays a considerable part in English political life. We even know the name of the man to whom the origin of this institution was, at least as long ago as the twelfth century, attributed. But, once more, we must be careful not to assume that Nigel, Bishop of Ely in the twelfth century, to whose inventive genius its origin is attributed by the pious relative from whose *Dialogues of the Exchequer* we learn so much of the working of the institution in that century, imposed it as a full-blown scheme upon the country. It is far more likely that Nigel, the royal Treasurer, finding himself embarrassed by many practical questions, acquired the habit of calling together, from time to time, his subordinate officials, notably the sheriffs, to deal with them. By the simple recurrence of this casual process, the Exchequer had become, by his successor's time, an elaborate institution, meeting regularly twice a year in the royal palace, and virtually serving as a financial board, which supervised the collection and distribution of the royal revenue.[1] Another powerful institution, vitally connected with the Exchequer, and, like it, established at least a hundred years before Parliament, was the periodical circuits, or "assizes," of the King's Justices, going round the counties, at first mainly to enforce the King's miscellaneous financial claims, especially in respect of the "Crown lands," but quickly developing into an elaborate scheme for the administration of justice generally. In this case, however,

[1] It is tolerably clear that the practical questions above referred to arose mainly out of the distinction between the King's personal resources (probably kept in a chest in the royal bedchamber), and what was coming to be regarded as the national revenue, to be spent only for public purposes. The name "Exchequer" is said by Richard, the author of the *Dialogues*, to be taken from the chess-board (*scaccarium*) on which the more difficult calculations were made. The institution of the Exchequer was known in France and Sicily, and is said to be of Norman origin.

it is only right to state, that the practice was borrowed, as an institution, from the policy of Charles the Great, who found it necessary, for the effective oversight of his vast domains, to sent *missi*, or messengers, periodically through the provinces of his Empire.[1]

On the whole, it may be taken that the end of the thirteenth century saw the State (not the name, but the thing) established in England as a definite complex of institutions working with regularity, and claiming to exercise control, to a greater or less extent, over all the inhabitants of the country The claims of the incipient State, as detailed in the *Heimskringla* (p. 26) some two hundred years before, had already been broadened by the practical disappearance in the wars of Edward I of the feudal military force (the descendants of the Conqueror's followers) and its supersession by a mixed force composed of hired soldiers (*solidarii*), levied by "commissions of array,"[2] and the ancient *fyrd* or militia levies of the counties, which the King's prudent predecessors had carefully kept on foot as a check on their somewhat unruly "knights" The county militia was led by the sheriff, usually a local personage.[3] But, after a sharp struggle, such independent power as the sheriff enjoyed was taken away from him; and, before the end of the thirteenth century, the sheriffs came to be appointed annually by the King, a practice known as "picking the sheriffs," which still continues. Thus it was not difficult for the King to assume, that the command of the whole of the armed forces of the country was vested

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[1] The kind of business entrusted to these circuit officials in England at the end of the twelfth century may be seen *set* out in considerable detail in the commissions issued to the "itinerant" justices in 1194, and reproduced in Stubbs' *Select Charters*, pp 259-62

[2] Whence the modern title "commissioned officer" The "commissions" raised their regiments on a contractual basis

[3] Many of the sheriffships had become hereditary, and the kinds of abuses to which their independence had given rise are vividly detailed in the famous Inquest of Sheriffs held by Henry II in 1170 (Stubbs, *op cit* pp 148-50)

in himself[1]—an assumption which was not afterwards seriously contested until the outbreak of the Civil War in 1641. The "ferm of the shire," a sum fixed by custom, and said to represent the ancient gifts rendered to the kings of pre-Conquest England in lieu of their patriarchal entertainment on their visitations of their tribesmen, may be said to represent the "scatt" of the *Heimskringla* (p. 26); but this had been a good deal expanded as the result of the Domesday Survey, and still further broadened into a "carucage" or general land tax by the beginning of the thirteenth century.[2] Fortunately, the rapid advance made by the youthful Parliament in the fourteenth century, in its demand for control of taxation, did much to check what might have been a dangerous tendency to expansion of this kind of prerogative levy.

It is one of the ironies of history, that the development in England of the doctrine of "sovereignty," previously alluded to (p. 15), at any rate as regarded internal affairs, was powerfully aided by the famous institution of Parliament, usually associated in popular estimation with liberty of the subject But, whatever view one may hold as to the wisdom of the theory of the sovereignty of the State—i e. the limits of State action—the fact is so; and it is as curious as it is important.

SOVEREIGNTY OF PARLIAMENT

It is well known, that one of the reasons for the comparative failure of the several representative national assemblies which appeared on the Continent of Europe about the same time as the Parliament in England, was, that the demands made by the rulers of those countries on their assemblies were often defeated by the reply of want of

[1] This position is made quite clear by the survival of a writ of the year 1217 to the sheriffs to summon (*a*) the feudal array and (*b*) the militia of his county (Stubbs, *op cit*, p 343).

[2] See the writ of 1220 directed to the sheriff to levy carucage in the county of Northampton (Stubbs, *op cit*, pp 352-3)

authority from the latters' constituents. In other words, the representatives of the constituencies treated themselves as agents of their constituents, and relied upon the recognized principle of agency, that an agent must obey the directions of his employer Each representative brought to the assembly his *cahier* (as the French called it) or written instructions, and considered himself bound by it. On the other hand, whether by deliberate foresight or not, the royal summons to the famous Parliament at Westminster of 1295, the model of all subsequent United Kingdom Parliaments, contained the words: *plenam et sufficientem potestatem* (*habentes*) *ad faciendum quod tunc de communi consilio ordinabitur*;[1] and these words, or their equivalent, remained part of every similar summons to the English Parliament until well on into the nineteenth century [2] It was, therefore, impossible for the Commons representatives in England to put up a plea of *non possumus* to any demand by the Crown or its Ministers Oppose the demand they might, and frequently did; but to say that they had no power to consent to it did not lie in their mouths. Not unnaturally, the conviction soon arose in England, that there were no legal limits to the powers of an Act of Parliament passed with the concurrence of King, Lords, and Commons respectively; and thus the Parliament at Westminster came to regard itself as a "sovereign" body, in the strictest sense of the word, at least so far as the United Kingdom was concerned. Until the end of the sixteenth century, there were faint expressions of doubt on the part of the champions of the unwritten common law, and a more formidable opposition from the Church, which claimed the ecclesiastical control of the national community by her own law and tribunals But this latter claim could hardly be maintained in the face of the

[1] "(Having) full and sufficient power to do what shall of common counsel be ordained" (See the form of the writs of 1295 in Stubbs, *op cit*, p 486)

[2] The form for 1837 is given in Anson. *Parliament*, 5th ed, p 61

CHAPTER IV

The Fusion of State and Nation

THE event alluded to in the closing lines of the preceding chapter was, of course, the occurrence of the Great Plague, commonly called the "Black Death," which swept over Europe from the East, during the years 1348-9, and is said to have destroyed, by a sudden stroke, some half, possibly more, of the population of England.[1]

Though the Plague was no respecter of persons, it was inevitable that its ravages should be felt more severely among the poorer inhabitants of the country-side and the towns, than in Court circles and the castles and houses of the manorial lords. These inhabitants had, on the whole, been improving their social position during the previous two centuries The villager whom the Norman Conquest and Domesday Book had depressed from a co-owner with his fellows of the village fields to the position of a serf bound to labour on his lord's "demesne,"[2] had been winning his way back to the position of a free peasant. The fact that he was still, in theory, *adscriptus glebæ*, bound to the soil, probably did not worry him, unless he was an exceptionally ambitious person; because all his interests centred in his village, and, in the (to us) almost inconceiv-

[1] In the absence of vital statistics for the period, it is impossible to be certain of the exact figures The above estimate is accepted by modern historians, e g Professor George Trevelyan

[2] This was mainly due to a fiscal arrangement, by which the lord admitted responsibility to the Exchequer for the peasant's share of the Danegeld levied on the manor, the peasant then "working his share out" as a serf labourer on the lord's "demesne," or "inland," i e the land worked by the lord himself through his bailiff. [See Vinogradoff *Villeinage in England*)

able isolation of country life in the later Middle Ages, he could hardly imagine existence elsewhere. But what did matter to the peasant of the fourteenth century was, that by a gradual but widespread process, known, technically, as *adæratio*, which had taken place, informally and irregularly, during the two preceding centuries, he, the peasant, had, very largely, commuted his personal labour dues for a fixed money payment to his lord. It was an arrangement at the time considered advantageous to both parties. The lord's bailiff was relieved of the anxiety of keeping a labourer, who much preferred to spend his time in working on his own share in the common fields, grudgingly at work on his lord's demesne; while the labourer himself found it far more convenient to pay a fixed sum half-yearly to the bailiff than to be liable to forced labour dues. Actually, the labourer had, often, made a good bargain; for the value of coined money had been falling for a considerable time, while the wage of hired labour had proportionately increased, and the landlord who relied upon it was proportionally worse off.

The occurrence of the Plague soon rendered it almost impossible to hire agricultural labour at all, except at a ruinous cost. Any leisure which the surviving peasants could spare from their own acres could command a monopoly price For the first time, the law of supply and demand, in all its grimness, arose as a spectre on the landscape; and, not unnaturally, the emancipated peasant took full advantage of it In their despair, the feudal landowners endeavoured to revive the personal labour dues of pre-commutation days, despite the fact that the commutations had mostly been recorded on the manorial rolls, and that, in many cases, the peasants had received charters of emancipation. As is well known, this claim aroused an opposition so fierce and widespread as to amount almost to civil war.

But the landowners had a more powerful weapon in reserve. Owing to the restricted Parliamentary franchise

then existing for the "Knights of the shire,"[1] and the superior position of these to the timid representatives of the cities and boroughs in the Commons House, to say nothing of the fact that the Upper House was composed, almost exclusively, of great landlords, it was easy for the landowners to rush through Parliament a series of revolutionary statutes, known as the "Statutes of Labourers," which practically dominated the labour market during the fifteenth and sixteenth centuries. These, in effect, set up a system by which every labourer,[2] not already in employment, could be compelled to work for anyone who chose to employ him, at a rate of wages originally described as "customary," then fixed by the statutes, finally assessed periodically by the Justices of the Peace; the latter a comparatively new institution set up by statute, and appointed by the Crown for each county and a good many boroughs. Any breach of the numerous provisions of these statutes, in theory either by employers or labourers,[3] was made summarily punishable by the Justices; and, in effect, the whole control of the relations of master and servant was placed in the hands of the Justices, to be exercised in a summary manner. This was, in effect, the earliest phase of the "summary jurisdiction" which now plays such an important part in the administration of the criminal law. The powerful gilds of the merchants and craftsmen of the towns probably at first escaped the meshes of the Statutes

[1] This qualification, which was enforced till long after the fourteenth century, rendered it impossible for a peasant to be elected to Parliament, while the franchise itself was restricted to "freeholders who may dispend forty shillings a year at the least"—a large sum in the fourteenth century.

[2] This term was made to include, not only agricultural labourers, for carpenters, masons, tilers, and plasterers, whose occupation would appear to us to be rather urban than rural, were included in the statute of 1351. The only exceptions were merchants, "skilled artificers," and persons living on their own land.

[3] In theory, any employer who paid more than the statutory rate of wage was guilty of a criminal offence. But it may fairly be assumed that the labourer who was the victim of such an offence was not likely to complain of it.

of Labourers. But they were later brought within the State system by the great Apprenticeship Act of 1562; and the whole system was enforced and driven home by the Combination Acts of the eighteenth century, which long prevented the organization of Trade Unions after the Industrial Revolution, till they were repealed in 1824-5.

It is not to be supposed, that this serious invasion by the State of the economic life of the nation passed without protest from the persons who felt themselves to be directly injured by it. Despite a good many provisions in the later Statutes of Labourers which show at least an apparent desire to be fair to both parties, the labourers felt that the whole force of the State had been employed to deprive them of a golden opportunity of enriching themselves as a compensation for their frightful losses during the Plague. It was not accidental that the teachings of Wycliffe, John Ball, and Langland followed closely upon the establishment of the system of the Statutes of Labourers; and that these culminated in the Peasants' Revolt of 1381, which was by no means confined to what we should call peasants. The rising was at first handled skilfully by the young King, Richard II; but, after the authorities had been scared by an attack on London, severe reprisals were taken, and it was not until two of the leaders of the rising had been killed, that the revolt was stamped out. Ultimately, the great landowners found a more effective answer to the loss of their serf-labour than the Statutes of Labourers, by the turning of their great arable areas into sheep runs, requiring very little labour; and thus the question was really solved. But this remedy brought into prominence another problem of even greater importance, rarely to be absent in the future from the economic field—the problem of unemployment among the peasants unwanted on sheep runs. Thus the first serious attempt of the English State to handle an economic problem on a great scale cannot be said to have been fortunate, mainly because it was felt by the great mass of the nation not to be honest. But its failure

had done nothing to restrict the limits of State action. Rather had it inspired its opponents to aim at getting the authority of the State into their own hands.

INCREASED ACTIVITY OF THE STATE

The unhappy fifteenth century, occupied almost entirely in English history by foreign and civil wars, seems to have had little effect in elucidating the problem of the limits of State action. But the energy of the new Tudor monarchy, which, on the whole, was popular in the ordinary sense of the word, affords little evidence that the ill-feeling which followed upon the passing of the Statutes of Labourers had caused any permanent restriction of the activities of the State in controlling the economic or even the social life of its subjects. In applying the test previously used with regard to the fourteenth and fifteenth centuries to the sixteenth, and making allowance for the very large number of private Acts relating to forfeitures, restorations, and the like, which followed the Wars of the Roses, we find, in looking down the Chronological Table of Statutes in the reigns of Henry VII and his son, that the State is beginning to take a deep interest in such matters as the improvement of tillage to counteract the introduction of sheep farms, formerly alluded to (p. 39), while devoting much care to the manufacture of the famous English broadcloth which that movement had produced in vast quantities, also in the improvement of leather-dressing, in the safety of internal navigation, in the breeding of cattle, in the trade of butchering, in the regulation of alehouses, in the treatment of flax and hemp, and in the breeding of horses. When a town or city suffered from fire or floods, Parliament came to its aid with what we should now call a town-planning scheme. The problems arising out of the new herring fishery which had sprung up after the sudden and unexplained migration of the herring from the Baltic to the

North Sea, were carefully treated [1] Most intimate of all, the apparel of the lieges was regulated by more than one Act of Parliament of the sixteenth century. What was, perhaps, the most important economic change of the century, though it does not appear in the Statute Book at all, was undoubtedly due to the direct action of the State, for the conversion of "champaign" into "several" husbandry by the Enclosure Commissions of Edward VI, unpopular as it was in many quarters, was undoubtedly a great stimulus to production Even the delicate process of distributing the assets of an insolvent debtor proportionally among his creditors was undertaken by Parliament; the first English Bankruptcy Act dates from the reign of Henry VIII. Into almost every relationship and interest of the national community the State penetrated; and, whatever individual opinions there might be as to the policy of these measures, there seems to be no evidence that they were regarded as being outside the State's proper sphere.

FREEDOM OF CONTRACT

But when we pass from the sixteenth century to the seventeenth, there appears on the scene a new institution destined to prove, ultimately, a powerful rival of State authority or, at any rate, State activities Students of the history of English Law are well aware that the seventeenth century is, emphatically, the century in which the *contract*, or, as an English lawyer would probably put it, the "simple contract," begins to dominate English economic life It would be impossible, without entering into technical details which would not interest the general

[1] This was one of the most important events of the fifteenth century, for it virtually led to the downfall of the great Hanseatic League, and the capture of the herring industry in the North Sea by the English and Flemings (See Williamson *Evolution of England*, Clarendon Press, 1931)

reader, to trace the history of this powerful institution at any length. The word "contract," of course, is much older than the seventeenth century, even in legal proceedings, having, probably, been imported from Roman Law. But, again, as students of English legal history are aware, it was for long used in a restricted sense, to signify certain formal engagements, which could be enumerated and, as it were, "ticketed," and which still bore about them certain features dating from remote antiquity.[1]

From the very beginning of the seventeenth century, however, the English Courts, after a good deal of hesitation, began to take a much bolder line.[2] They were inclining to the view, that any promise or undertaking given by a person of full age and legal capacity, to another person, having an element of mutuality,[3] could be made the basis of legal proceedings against the party to the transaction who failed to observe his undertaking, with an unlimited power in the Court (or a jury) to award pecuniary damages against the defaulter. Steadily this doctrine worked its way into all business relationships, superseding the medieval idea of the customary or fixed price, and the canonical view of the "just price." Of course there were certain safeguards and restrictions. No contract having in view the commission of a crime or other illegal object would be enforced by the Courts. Certain well-recognized types of oppressive contracts, e g. contracts made with expectant heirs and inexperienced people, were frowned upon; though the repeal[4] of the Usury Laws after the Reformation did a good deal to tie the hands of the

[1] e g the "bond," the "debt," and the "deed" or sealed document.

[2] The critical date is the year 1603, when, in what is known as "*Slade's Case*," all the Justices of England, in the Court of Exchequer Chamber, solemnly resolved that "every contract executory imports in itself an assumpsit" (or undertaking)

[3] This is the mysterious doctrine of "valuable consideration," believed to be peculiar to English Law.

[4] The repeal was gradual, beginning in 1545, and not being complete until the nineteenth century.

Courts in this respect. For a long time no married woman could bind herself by contract. But so popular did the institution of Contract become, that it passed from the sphere of economics to the sphere of political speculation; and Locke in England and Rousseau in France, with their theories of a Social Contract which was supposed to be the origin of national communities, and further, to lead to important political conclusions,[1] exercised a very great influence on practical politics. In Sir Henry Maine's famous phrase, society appeared to be "passing from status to contract."

But, of course, the final triumph of the new institution, and its effect on State activities, came with the Industrial Revolution of the eighteenth and early nineteenth centuries. The enormous potentialities revealed by the new discoveries in physical science, and the practical use made of them by geniuses like Hargreaves, Watt, Arkwright, and others, were seized upon by men of great energy but little scruple, who saw the chance of making enormous fortunes by specializing on the production of the new manufactures rendered possible by the discoveries. The newly recognized principle of the "division of labour" brought about the collection in huge factories of the former "artificers" and agricultural labourers. Both for the *entrepreneur* and the new type of workman, the institution of the Contract seemed an ideal weapon; though experience soon taught the latter that, without organization, the parties hardly stood on equal terms. And it is, again, one of the ironies of history that the workmen are said to have been the last to defend the once-hated system of the Statutes of Labourers. No doubt, when business was brisk, and huge fortunes were being rapidly made, the workman could use

[1] Unfortunately, eminent thinkers drew different conclusions from similar premises. Of course there is little, if any, historical basis for the Social Contract, though the recognition of the Republics of the Netherlands and Switzerland by the Peace of Westphalia may be said to have been influenced by it. At the best, the theory is convenient as an expression of certain fundamental truths.

his contractual power to secure high wages. But one of the unpleasant features of the new system of production (if system it could be called) was, that periods of prosperity alternated with periods of depression, and that then the manufacturer, running his works at a huge cost, could use *his* contractual power to beat down wages, with the alternative of dismissal and destitution for the workman.

LAISSEZ-FAIRE

It is hardly surprising to find, in view of these circumstances, that a reaction against the activities of the State, leading up to a definite philosophy of *laissez-faire*,[1] should have set in. It must be remembered that, until the passing of the Reform Act of 1832, not even the leaders of the new industrial world were adequately represented in Parliament. The old medieval franchises, which still governed the composition of the House of Commons, had enabled the great landowners very largely to control the elections through a corrupt system of "pocket boroughs"; and the patrons of such boroughs were by no means anxious to introduce into the House vigorous representatives of the new order which they regarded with suspicion as aiming to rival the hitherto unquestioned dominance of the landed interest.[2] Rather were they inclined to exercise their powerful patronage in favour of younger sons of the nobility and the great landowners, or merchants who had returned from India loaded with the spoils of the "pagoda tree." This latter class, though not in all ways sympathetic to the old order, were more anxious to associate themselves

[1] The attitude of mind which deprecated as unwise any extension of State activities will be found well described in two books written in later days, viz. Dicey. *Law and Public Opinion in England*, 2nd ed., 1914, Macmillan, and Jethro Brown *Underlying Principles of Modern Legislation*, Murray, 1912.

[2] In addition to the manipulation of the boroughs, the landowners were able very largely to control the county elections through their tenants.

with it than with the rough manufacturers of Lancashire and Yorkshire. Naturally, the latter, rapidly becoming the real leaders of the nation, felt little confidence in the ability of Parliament to deal wisely with the new problems of industry which were constantly arising, and preferred to settle these problems by their own individual action On the other hand, the working classes, angered by the harsh application of the Combination Laws which attempted to stifle all their attempts to better their position by strikes and labour organizations, had ceased to regard the State as a source of protection Consequently, neither side felt much confidence in the activities of Parliament, or any great desire to multiply them If we resort to our old test of reading down the list of Acts of Parliament in the Chronological Table, we find that, in spite of the large number of local Acts which probably represented purely local efforts, and excited little general interest, the statutes of the last quarter of the eighteenth century and the first quarter of the nineteenth, which deal with important internal questions of general interest, is surprisingly small. Most of the energy of Parliament appears to have been absorbed in guarding against the dangers arising from revolutionary propaganda, and the carrying on of the war against France, then dominated by the formidable figure of Napoleon Bonaparte Page after page of the Chronological Table fails to record the title of any statute which has left a permanent mark upon the economic or social life of the nation

REACTION AGAINST *LAISSEZ-FAIRE*

Once more, however, the tide turned Towards the end of the French War, public opinion began to incline in favour of Parliamentary Reform The successful outcome of the war had left among all classes in England an intense pride in English institutions, and, except amongst those whose vested interests were seriously threatened by projects of reform, a desire to make them still better Though the

country had, on the whole, stoutly rejected the extremer projects of the French revolutionaries, it had been impressed by the brave resistance put up by Revolutionary France to the armies of Europe; and the teachings of the Encyclopædists and other enlightened French thinkers had left their mark. Moreover, the manufacturers and the new commercial classes generally, felt it a slight that they, in whose hands were centred so much of the wealth and enterprise of the nation, should be practically without representation in the House which, by its long and successful traditions, had become the chief power in the State, while the new urban masses, who had been much more affected by the propaganda of the French revolutionaries, were feeling their way to the movement which afterwards became known as Chartism, and which was concentrated almost entirely on Parliamentary Reform.

The success of the first Reform Act, limited as it was in its constitutional results, in producing beneficent legislation, went far to strengthen the belief in the power of the State to profit the community by an extension of its operations. Perhaps the great statutes which emanated from the reformed Parliament did not rouse intense enthusiasm among the humbler classes of the nation. But the rapidly growing and increasingly intelligent middle classes realized that a Parliament which had to its credit, after a very few years, such a list of reforming measures as the Acts which abolished the more glaring abuses of an antiquated legal procedure, placed the new and highly popular system of trading companies on a reasonable basis, recast the antiquated law of inheritance (including testamentary dispositions),—introduced a uniform system of municipal government in the place of the disordered anomalies and corruption of the old boroughs, and simplified the costly absurdities of dealings in land, was at least a live force And the rapid series of Acts modifying the horrible severities of the old criminal law which was associated with the accession of the young Queen Victoria in 1837, to say

nothing of the Act abolishing slavery throughout the Empire, and the passing of the first of the long series of Factory Acts, seemed to show that the standard not only of intelligence but of humanity had risen substantially as the result of reform.

As is generally known, the movement for the extension of the franchise went on vigorously during the whole of the nineteenth and early twentieth centuries, until now every adult member of the English nation, male or female, has, *primâ facie*, a direct vote for elections to the House of Commons, while the Party organization of the House renders it possible for any member of the House, however humble his origin, to aspire to membership of the Ministry of the day, the real exercisers of the power of the State. Whether or not the present suspension of Party hostilities continues, the age long problem of the competence of political action, or, as it was put by a well-known writer, of the Man versus the State, has become a problem, not of law, but of policy The doctrine of "sovereignty" (pp. 15-16) has triumphed all along the line; and no constitutional lawyer would now contend that any Act of Parliament is technically *ultra vires*. But the change in the character of the problem does not lessen its importance; and the question of the principles which should guide the nation in entrusting to, or acquiescing in, the exercise of functions by the State, will require a chapter to itself Before we turn to this subject, however, a few lines must be devoted to a side-issue which, to prevent overloading the earlier pages of this chapter, has hitherto been held in reserve.

LOCAL AUTHORITIES

This is the question · how far, in considering the activities of the State, have we been justified in assuming that these include the action of what are now known as "local authorities," which do, undoubtedly, at the present

time exercise a great deal of governmental control over their localities, and, possibly also, those professional and industrial organizations which can, in the last resort, rely upon the strong arm of the State to enforce their authority?

There can be no question that something in the nature of local organization, probably of a primitive type, was known in England long before the definite establishment of a central State authority with the Norman Conquest. We may not know much of the actual working of such ancient institutions as the township,[1] hundred (or wapentake) and the shire or county. But their existence was quite clearly recognized by the Conqueror, who, in fact, took considerable pains to compel them to fulfil their functions. With the feudalizing process which developed rapidly after his arrival, the township moot soon became absorbed in the manorial court of the lord. But the "pleas of the hundred" were definitely treated as typical of the lay jurisdiction in the well-known charter by which the Conqueror, in pursuance of his bargain with the Pope, authorized the establishment in England of special Church courts; and the Angevin kings, when they set up their circuit courts (p. 30), made much use of the shire or county courts to provide audiences for the royal commissioners, who, as will later appear, built up the great system of the Royal Courts of Justice in England. That there was even something of a hierarchy of the lay jurisdictions is shown by the fact that the "reeve, priest, and four lawful men of each township" attended at the meetings of the shire court. Broadly speaking, a similar ancient background lay behind the centralized governments of most of the medieval States of the Continent.

One special feature of these ancient jurisdictions was the rule that, in them, the "suitors" (i.e. the persons attend-

[1] The notion that a township was a little town is quite unhistorical A township was no more a "little town" (in the modern sense) than a lordship was a little lord The township (tunscipe) was the village unit, afterwards known as the "parish."

ing) were the judges ; for the business was unspecialized into the later distinctions of judicial, administrative, and the like In other words, any matters of general interest to the community which they represented were discussed, and were disposed of by primitive methods

It is also quite clear, from the evidence of Domesday Book, that, again long before the Norman Conquest, something in the nature of urban aggregates of population, usually known as " boroughs," had definitely established special customs of their own, which were protected by royal and other charters. One of the most common and valuable of these was the *firma burgi*, or lump sum paid for exemption from all outside claims—a fact which shows, almost conclusively, that a substantial amount of " self-government " was enjoyed by these centres But the best evidence is to be found in the Report of the famous Royal Commission of 1832-5, which led to the passing of the great Municipal Corporations Act of the latter year Doubtless, this Report showed that these " corporations " had fallen into a lamentable state of decay and corruption. But it should not be forgotten, that, long before 1835, the central government, by invading the proper provinces of the local institutions, spasmodically and frequently, had done much to bring these institutions into contempt [1] A particularly glaring instance of this interference was the passing, in the year 1601, of the famous Act of Parliament which imposed upon every parish the duty of levying a " rate " for the relief of the indigent poor by " setting of them on work," and appointing " overseers " to collect the rate If socialists can claim that this statute was an emphatic recognition of the duty of the State to care for the economic welfare of every individual in the nation, the advocates of *laissez-faire* can point to the fact that it started the nation on a career of

[1] The very fact that the boroughs were " corporations," an institution not recognized till centuries after the Norman Conquest, had enabled the municipalities to acquire property on behalf of the burgesses, and in other ways exercise a great amount of self-government

extravagance and maladministration which nearly brought about national bankruptcy at the beginning of the nineteenth century.

As is well known, the whole system of local government in England has been radically overhauled by numerous statutes of the last century, especially in connection with such matters as public health, sanitation, education, road transport, and housing accommodation for the working classes. The actual administration in such matters is still mainly in the hands of locally elected persons, with the exercise of whose discretion, so long as they keep within the law, the central government does not interfere. In this sense, local government may still be said to be outside the sphere of the State. On the other hand, the increasing number of specific duties imposed upon the local authorities by Act of Parliament, and the discretionary allocation by the Treasury of large sums of money to be expended by them, in fact tend to make the local authorities sub-departments of State As is equally well known, this fact was clearly recognized by the establishment of the Local Government Board in 1870, and its subsequent incorporation into the Ministry of Health. It would appear, therefore, that any general inquiry into the proper scope of State activities must inevitably include at least the acts of local authorities, the more especially as the "government" exercised by these authorities can claim the support of the State tribunals, so long, but only so long, as the local body acts within its legal powers. But it should never be forgotten that, by the undoubted rules of English Law, no local authority can shelter itself behind the "sovereignty" of the State, popularly expressed in the maxim: "The King can do no wrong." Anyone injured by the unlawful act or neglect of a local authority can bring an action against the authority in the ordinary courts, substantially as though the authority were a purely private individual. The very limited immunity from the consequences of this rule grudgingly granted by the Public Authorities Pro-

tection Act, only serves to emphasize the rule itself There is no "sovereignty" about a local governing body in England, whatever may be the case elsewhere If a local authority makes a claim of any kind, it has to show its legal title to it. And that title will, in nine cases out of ten, be an Act of Parliament.

CHAPTER V

Limits of State Action

SUBJECT to the important doubt, discussed at the end of the last chapter, whether what is in England called "local government" (i.e. administration of a strictly limited area for strictly defined purposes by an elective body of citizens living within that area) can properly be considered to be State action at all, we have seen that, so far as positive law (whether written or unwritten) is concerned, there are no legal limits to State action in England. Without falling back on the classical illustration of a possible Parliament enacting a possible law for the massacre of all blue-eyed babies, we may point out that it would not be illegal, even at the present day, for Parliament to pass an Act requiring the attendance, for a greater or less number of times in the year, of every person resident in England, at religious worship conducted according to the rites of the Church of England, on pain of a pecuniary fine for neglect. No judge or magistrate could refuse to enforce such a penalty, without resigning his office. The safeguards against freak legislation are not an appeal to the Courts, but a recognition of the simple fact that Parliament is composed of human beings, half of whom have to stand for re-election within, at the most, five years, and comparatively few of whom are anxious to figure as reactionary tyrants

Similar considerations apply to much less extreme proposals from time to time put forward by practical politicians. Let us suppose, for example, an Opposition with an avowed platform containing "planks" which, to a very

large number of educated and influential members of the community, appear to be revolutionary, and which yet, by the chances of a General Election, is returned to power It is fairly certain that, at the first attempt to turn these extreme proposals into legislation, the new Government would meet with resistance in Parliament itself, not only from the new Opposition, which the supposed supporters of the Government could, *ex hypothesi*, outvote, and from the House of Lords, which it could overcome by means of the Parliament Act, but also from some of its own more moderate supporters To meet this difficulty, it has been suggested by some quite distinguished political thinkers, that, in the first flush of victory, the new Government should demand from Parliament the passing of an Act in the nature of the famous Defence of the Realm Act, 1914, by which the Crown (that is, practically, the Ministry of the day) should have an almost unlimited power to issue Orders in Council to preserve the " safety of the Realm " Let us suppose that, in spite of the risks of adverse opinion in the House of Commons itself, above alluded to, the demand should be granted The Ministry would still find itself very far from being in a position of unlimited power

DIFFICULTIES IN THE EXERCISE OF SOVEREIGNTY

In the first place, it would be open to any member of the public to contend, in a Court of Law, that the terms of a particular Order in Council were not justified by the powers conferred on the Crown by the Act, the passing of which we have assumed It is, of course, well known, that, more than once during the Great War of 1914-18, the Courts pronounced against the validity of an Order in Council issued under the powers alleged to have been conferred by the Defence of the Realm Act, or, at any rate, against the applicability of the Order in a particular case

And it is hardly likely that, in any circumstances less strenuous than those of the War, there would be any greater hesitation on the part of the Courts in criticizing the legal validity of such an order in Council.

In the second place, it might, conceivably, be possible that the Government in power might fall back on the somewhat shadowy claim of the Crown to issue "prerogative" Orders in Council which do not depend upon the authority of any Act of Parliament for their validity. For historical reasons, it must be admitted that such prerogative powers do, in fact, exist in a few cases in England. For example, it is said that, except so far as statute forbids it, the Crown may issue any regulations for the control of its own servants, military or civil. But again, the question whether, in point of law, any such regulation is justified by the prerogative, is for the Courts to decide; and, as a matter of fact, it is now held by the Courts of Justice that if, even without express reference to the prerogative, Parliament has shown an intention to take the subject in question into its own hands by statutory enactment, that intention is sufficient to deprive the Crown of its power to control it by prerogative.[1]

Short, then, of an Act of Parliament to empower the Crown, i.e. the Ministry of the day, to legislate on any subject in any manner that it chooses, even by abolishing such venerable institutions as the Courts of Law, a revolutionary Ministry would find itself hampered at almost every step, by a popular opposition, much more formidable than an Opposition in the House of Commons itself. And it is as impossible to imagine any British Parliament passing such an Act, as it is impossible (again to use the classical example) to imagine it legislating for the massacre

[1] This was the real principle involved in the case, well known to English lawyers, of the commandeering of the De Keyser's Hotel during the War, by the military authorities. There was no doubt about the right: but it had to be exercised under conditions prescribed by Act of Parliament for the purpose.

of all blue-eyed babies. Such a proposal would transfer the revolution from Parliament to the streets, which is probably the last thing that its proposers would desire.

Apart from Parliamentary legislation, of course, the question, at any rate in England, is not merely one of discretion, but of law. In spite of the fact that Parliament and State are not co-extensive, it is hardly possible to imagine any extension of State action which would not be illegal because it conflicted with the rights of the individuals affected by it So far as this country is concerned, the dubious theory of "sovereignty," despite the polite use of the qualifying adjective "sovereign," is strictly limited to the authority of Parliament. Indeed, there is some not very good legal authority for saying that even the mere failure of a Crown official to do his duty in a particular case, whereby a private individual suffers detriment, can be made the basis of a complaint in the Law Court. At any rate, in a famous case, decided some two centuries ago, it was held that a returning-officer who refused to record the lawfully tendered vote of a would-be elector at a Parliamentary election, was liable in damages to the tenderer. But there has since arisen a good deal of doubt as to how far this decision is law ;[1] and, in any case, such an action lies only against the offender in his personal capacity, and not as a representative of the State

The question, then, which political science has to answer as to the limits of State action, is not, in England at least, a question of law, or even a question of practical difficulties, but the much more difficult question · For what kinds of activities is the machinery of the State a suitable instrument ? .

It is often a convenient method of discussing a question of this kind to begin by ruling out a few obvious cases in

[1] Particularly as to whether it lies for mere omission, or, as it is called, "non-feasance" Of course if the official's act constitutes a definite Tort, or legal wrong, he can be sued personally, and the plea of "superior orders" will be no defence.

which there can be no doubt. Let us remember that, whatever the historical origin of the State, it is now, as has been said, an institution or a group of institutions, which exists for the purpose of governing a particular kind of a community, known as a nation, and, for this purpose, endowed with the very dangerous power of exercising physical force, legally unlimited in extent.

CLEARLY UNSUITABLE ACTIVITIES

We may begin by taking it for granted, that nothing would justify a State in attempting to do anything which is, by the very nature of things, impossible, or, which amounts to the same thing, impossible within the means at the disposal of the State. For example, though a State is able, to a greater or less extent, to prohibit, or, on the other hand, to enforce, the practice of certain religious observances, it is clearly impossible for it to enforce, or even prohibit, religious *beliefs*. The matter was well put by an imaginary objector to a proposal for religious persecution, upon whom it was urged, that it is better to have a State religion than no religion at all. The objector replied : " I fail to see the distinction." A similar objection, of course, applies to any attempt by the State to impose intellectual beliefs or conclusions upon its subjects. Doubtless States still do, in certain cases, prohibit the *expression* of certain beliefs, probably because it is feared that certain consequences, which they regard as dangerous, may follow from such expressions But, after all, the holding of a belief or conclusion is one thing ; and the expression of it is another The latter is action, not merely belief Still, the State which prohibits the expression of beliefs, religious or intellectual, betrays its own nervousness, or, rather, the nervousness of those persons who are, for the time being, running the machinery of the State ; and this is, probably, one of the most dangerous things that an institution which

relies, in the last resort, on the exercise of physical force, can do. A State which enacted a law to prohibit an expression of belief that the earth is square, would render itself ridiculous There are other ways in which a State can combat the existence of beliefs which it genuinely believes to be harmful to the community which it exists to govern Endowment of education is a very obvious example.

Slightly below the level of actual impossibilities, perhaps hardly to be distinguished from them, stands the case of an enactment which so violently offends the sentiments, the desires, or, if the term be preferred, the prejudices, of an overwhelming majority of the members of the nation, that any attempt to enforce it would be impracticable. It is, of course, quite clear, that, in a democratic State, no legislative interference of the kind indicated could be even attempted without the support of a very considerable number of its active citizens But that is, obviously, not enough, in all cases, to enable it to be enforced. The classical instances in recent times happen to come from a great democratic community which, despite occasional lapses, has shown itself thoroughly law-abiding in essence In the statutes which endeavour to give effect of the undoubted principle that, since the Civil War, all citizens of the United States, whatever their race or colour, have been entitled to exercise their elementary political rights, the legislature finds it impossible to give effect to its enactments in all instances In the second case, that of what is generally spoken of as "prohibition," not only was it found impossible to give effect to legislation which had acquired a special solemnity by being incorporated into the Constitution of the United States ; but the appalling results which followed an attempt to put the legislation into force, led, within a comparatively short space of time, despite the constitutional difficulties involved, to an actual repeal of the "Eighteenth Amendment,"

No unprejudiced person can fail to admire the excellent motives which urged most of the promoters of the

Eighteenth Amendment to carry out their untiring labours. Many of their admirers were surprised at their initial success; but, though they expected difficulties in the execution of the Amendment, they were, probably, startled beyond measure by the unforeseen effects of "racketeering." The promoters of the Amendment, excellent as were their motives, had committed a first-class psychological error in failing to realize that legislation which it is practically impossible to enforce may be not merely ineffectual, but positively dangerous.

MATTERS OF TASTE

Apart from sheer impossibilities, the attempt of a State to impose control in matters the very essence of which is that the individuals concerned should be free to exercise the unfettered choice of their inclinations, is not only unwise, but apt to be disastrous. Obvious examples are, the choice of a marriage partner and daily apparel. The limited prohibitions of inter-marriage which still exist in well-ordered modern communities are, probably, justified by sound biological laws and a quite reasonable apprehension of the social difficulties which would arise from the inter-marriage of near relations, and, for similar reasons, the prohibition of marriage below a certain age But, for a State to go further, and act as a matrimonial agency charged with the selection and enforcement of marriages upon all and sundry, or even to refuse to issue marriage licences on the ground of "incompatibility of temperament," or other hypothetical causes, would clearly be destructive of that temperamental affinity which is, after all, one of the surest foundations of a happy marriage. The prohibition of bigamy, though this may work hardly in certain cases, and of incest, are justified by the serious social evils engendered by the commission of such crimes.

The importance of allowing freedom of choice in the

matter of wearing apparel is, perhaps, less great than that of freedom of choice in marriage; and, as is well known, States have, in the past, imposed rigid sumptuary laws. These laws have been influenced largely by political and economic considerations The State itself, for practical reasons, has felt obliged to impose severe sartorial restrictions on its own servants, especially its military and police servants; and it may, possibly, be argued, that it would simplify the task of government if everyone in a particular trade or calling were compelled to wear a distinctive type of dress, whereby he might be easily recognizable. If we put aside the obvious fact that, in most civilized countries at the present day, there exist a very large number of persons not following any particular calling, that is, more or less, what happens. The individual, in fact, chooses what he himself, or his fellows, believe to be the most convenient dress for his occupation in life, with such varieties of detail as happen to please his fancy. It may be added, that the choice of these details usually affords the chooser a certain amount of pleasure, and that it is difficult to imagine any State regulation more irritating, and, therefore, detrimental to the prestige of the State, than any attempt to limit his (and, still more, her) choice in such details.

OBJECTS OF THE STATE

When we turn, however, from the matters which are manifestly unsuitable for State interference, to the more positive aspect of those with which it may reasonably concern itself, we are faced with a fundamental question, the answer to which will, obviously, affect our view of the latter What may, at the present day, be considered to be the purpose or purposes for which the State exists? And by *this* is meant, not merely what may be called its more limited object, implied in its very definition as an institu-

tion, or group of institutions, for the government of a community known as a nation, but as the guiding principles or measure of its success. And here we have to notice a fundamental change which took place in Western civilization in the last quarter of the eighteenth century or thereabouts.

Up to that time, despite some speculation aroused by the writings of J. J. Rousseau and others, it may well be doubted whether, in the minds of European statesmen, or even in the New World which was beginning to affect so powerfully the political thinking of Europe, there was any serious doubt that it was, emphatically, for the State, and not for the Nation, to frame and carry out the policy to be followed by the State. Except perhaps, in England, where, owing to the success of Parliamentary institutions, public opinion had a way of asserting itself in a manner which astonished foreigners, the view taken by those to whom the conduct of State affairs was, in fact, entrusted, was that it was for them, and not for their subjects, to frame and carry out policy. The more liberal-minded of them might, doubtless, profess that the object of that policy was the good of their subjects. And even the less liberal-minded, when their minds were really bent on territorial aggrandizement and military glory, might admit that a contented and prosperous nation was a far more satisfactory foundation for their policy than a sullen and suspicious community. But it was emphatically for *them*, i.e. the statesmen, and not for their subjects, to decide what was good for the latter, in so far as State action was concerned.

Nor, indeed, was this attitude surprising In the first place, if our view of the origin of modern States is at all correct, the great majority of them had arisen from migration and conquest, or at least conquest; and it is not therefore to be supposed that they would acknowledge the right of the conquered to dictate to the conquerors.

In the second place, it must not be forgotten that the

medieval State had enormously increased its prestige by its alliance with the Church. We have already seen (pp. 16, 17), that the Holy Roman Empire was a dual conception of Pope and Emperor ; and the lesser potentates who rendered more or less allegiance to it were, until the religious Reformation of the sixteenth century, equally in alliance with, and sanctified by, the Church. No coronation was complete without an anointing. Even after the Reformation, the odour of sanctity still clung to the Protestant rulers ; and the " divine right of Kings " was as favourite a doctrine with some of them as with their Catholic brethren " No bishop, no king," was a fixed belief of the Protestant James I of England Was it to be thought of, that these semi-sacred rulers should condescend to seek inspiration from the subjects over whom they were called upon by Divine Providence to rule ?

Perhaps the first breach with this age-long tradition was the establishment of the little Republics of Switzerland and the Dutch Netherlands in the latter half of the seventeenth century In these countries, an elected President or a nominated Stadtholder could hardly claim any of the divine attributes of hereditary and sanctified rulers ; and, in sober fact, they were hardly more than the chief servants of the nations in whose names they spoke A little more than a century later, the American War of Independence brought into existence a new and powerful State which owed nothing to sacerdotal influences, and which was obviously incapable of continuance except with the active support of its citizens.

But, of course, beyond question, the supreme event which changed the conception of the relationship between the State and the Nation was the French Revolution of 1789 Founded definitely upon the individualist theory of natural rights, it was impossible for the French Republic to acknowledge any other source of authority than the nation which had deliberately brought it into existence ; and, in spite of the many changes of name and form which

the Republic afterwards underwent before the founding of the present régime, the essential characteristics of its foundation remained, and largely influenced the attitude of its neighbours. Doubtless, in the many European States which continued to maintain the form of hereditary monarchies, much of the old language of divine right continued to be heard; and some quaint practices, such as "touching for the King's evil," which is much older than Christianity, continued. But the ancient sanctity of the State had disappeared; and it became recognized for what it was, an institution, or group of institutions, which had gradually come into existence for the purpose of carrying on the functions known, in general terms, as the government of a nation.

But it was inevitable that, so soon as this truth was recognized, a new problem should arise. If the motive power, so to speak, of the old conception of the State had disappeared, what was to be the motive power of the new? Save for a few speculative thinkers, the idea of the autonomous self-working community was too abstract for serious discussion. The concept of philosophic anarchy was a later production; though there were practical anarchists in plenty. In the circumstances, it was almost inevitable that, when a discussion of the sphere of State action arose, refuge should be found in Rousseau's conception of the "general will" of the community. It was admitted, by reasonable controversialists, that this general will was often very hard to discover; that it was often still more difficult to decide whether any proposed action of the State fell within it, even when an affirmative agreement on the general question had been reached. But, at least as a working theory, it seems to have been agreed, after the political settlement of 1815, that the purpose of State or governmental activity was to give effect to the will of the nation.

THE GENERAL WILL

Such a working theory has, obviously, much to recommend it. In the first place, it recognizes that an institution, being, in itself, merely a piece of mental machinery, is a source of danger, like any other piece of machinery, unless it is given a legitimate purpose or objective, and used for that purpose or objective. The danger arises from the fact, that, being unoccupied for its legitimate ends, it may be seized upon by individuals and worked for harmful purposes, usually for the harmful purpose of aggrandizing the power of the individuals who have seized it So great is the influence of imagination on the human mind, that an institution, especially an institution with a great historic past, inevitably acquires an influence on human conduct which may have the most disastrous effects Students of Sir John Frazer's fascinating researches into the origin and early history of kingship, the germ from which the modern State has developed, will be familiar with some of the grosser superstitions, which, with their attendant and widespread sufferings of countless human beings, have arisen out of it And, though it is probably unwise to assume that all individuals who have profited, at the expense of their fellow men and women, by these superstitions, were prompted exclusively by unworthy motives, it is unquestionably true that, human nature being what it is, individuals who acquire authority by means of such superstitions are very apt to abuse it There are few more prudent metaphors in the limited stock of human wisdom than that which speaks of the "poison of power." And when we find an individual, or a small group of individuals, urging vast numbers of his or their fellow human beings to sacrifice freedom of choice, friends, leisure, families, charity, and even life itself, for the glory of an institution called " The State," we cannot help wondering how far their enthusiasm is influenced by the promise of

increased importance for their individual selves which may be expected to accrue if their exhortations are successful. Therefore it is, that an admittedly vague object or purpose such as giving effect to the will of the nation is a much safer ideal to put before mankind, than indifference to an institution of enormous appeal to the imagination, which may, by reason of that indifference, be appropriated by unworthy individuals.

MEANS OF ASCERTAINING THE GENERAL WILL

It is, however, freely admitted, that the ascertainment of what, in fact, on any given practical question, is the answer which coincides with the national will, is a matter of immense difficulty, as is proved by the variety of the means which have been adopted to attain it In the simpler days of the City State, when practically all the adult free members of the community were in the daily habit of personal intercourse with one another, there was, of course, much less difficulty; and the legitimate influence of eminent persons was asserted by much more truly civilized means than mass hysteria and terrorism, or even than self-advertisement by any of the various means which the discoveries of modern science have placed at the disposal of self-seeking individuals. But the City State has been replaced as the national unity by the Territorial State, counting its citizens by millions, only a comparative handful of whom can enjoy personal intercourse with one another.

The enormous changes in the method of ascertaining the communal will brought about by the changes of numbers and area just alluded to, have, broadly speaking, produced two great institutions known respectively as political representation and majority rule, which have so profoundly influenced the subject of government that they have re-

vived the ancient controversy to which the older writers, regard being had to the circumstances of their age, appeared to give unnecessary emphasis. It is time, therefore, that we turned to consider the forms which the State assumes; for it is, undoubtedly, by their anticipated success in operating these two great political institutions, that the forms of modern States have been shaped.

AN INTERESTING SUGGESTION

But, before doing this, it will be interesting to allude to a recently published work which, with exceptional clearness and definiteness, has suggested, as the true boundaries of legitimate State action, certain fairly wide limitations. As its title, *The Good Society*,[1] implies, the work is one with a fairly comprehensive outlook, which covers many intimate problems; and, though the author of it has decided preferences and dislikes, he is at pains to give for them

In Mr. Lippman's view, the chief mistakes made by recent speculators on the limitations of State action arise from the fact that they have under-estimated the enormous change in the economic character, not of the State, but of the Nation, brought about by the practical additions to economic capacity resulting from the Industrial Revolution of the late eighteenth and early nineteenth centuries. Before these additions were made, the nations of the Western World lived, so far as industry was concerned, in more or less water-tight compartments. They had become familiar with one another's products by commerce, which, especially after the discovery of the new sea-routes in the sixteenth and seventeenth centuries, had increased steadily in volume. But, so far as their consumption of goods which their own countries produced, in any substantial quantities, was concerned, they relied, almost exclusively, on

[1] By Walter Lippman George Allen & Unwin, 1937

their own efforts. In technical language, they were "self-sufficient" communities.

The Industrial Revolution altered all this, by the stimulus which it gave to the principle proclaimed by the Scottish professor, Adam Smith, in his great work,[1] published in 1776. In his view, the great lesson to be learnt from the new inventions was the superior power generated by specialization, or, as he called it, the "division of labour," in the production of wealth. Before the Industrial Revolution, the main idea of the rulers of a country in which some new article of practical utility had been produced, was to keep it in their own country, or, worse still, in the particular district in which it had been produced. If the last assertion seems fantastic, it must be remembered that these rulers naturally claimed the privilege of suspending their restrictions on payment of *octroi*, or transport duties; and that these duties, whether for internal traffic or foreign trade, formed a substantial part of their revenues.

The irresistible superiority of the division of labour brought about by the Industrial Revolution was speedily followed by the spontaneous realization, in the minds of the practical men who were its leaders, of a keen desire for its extension across political boundaries; and, after a struggle of about three-quarters of a century, the ancient barriers of customs boundaries were broken down, despite the opposition of the rulers of the States and the short-sighted prejudices of those who thought that they profited by the "self-contained" system. The struggle, was, of course, largely aided by the growth, to which allusion has already been made (pp. 61, 62), of the feeling that the purpose of the State was to give effect to the will of the Nation, and the consequent extension of the Parliamentary franchises which enabled that will to be expressed. For, after all, the division of labour had not been brought

[1] *Inquiry into the Nature and Causes of the Wealth of Nations* Strahan & Cadell, London, 1776.

about by the action of the State, but by the spontaneous adoption of it by peoples in countries separated by political boundaries—by goodwill, and not by military conquest.

The triumph of free trade, as the movement to abolish customs and *octroi* duties was called, was followed by such a substantial rise in the standard of living in the countries which achieved it, that, for the greater part of half a century, little attempt was made to reverse it. But, during this period, the champions of the movement made, according to Mr Lippman's contention, a profound mistake Realizing that most of the obstacles of free trade in the struggle which they had been waging, were due to the direct action of the State, they jumped to the conclusion that *all* State action in economic affairs was necessarily harmful They may have been right in the days of restrictions,[1] before the free trade battle had been won ; though, even then, it was only a particular kind of State action that was really harmful But, in their hatred of political trade barriers, liberal thinkers had contracted an unreasonable suspicion of all State action. This was the epoch known as that of *Laissez-Faire*, which, whatever its historical origin, is represented in England by the names of John Stuart Mill and, even more, of Herbert Spencer, whose work *The Man versus the State*,[2] marks the culmination of the doctrine The very success of the movement led to its unpopularity For it enabled all kinds of oppression and abuses, which called loudly for redress, to be practised with impunity , every proposal of reform being met by the objection that it was idle to attempt, by legislation, to "protect people against themselves." Thus associated with the champions of freedom, the oppressions and abuses in question came to be regarded unfavourably in countries

[1] Mr Lippman, in the work quoted (pp 184-5), suggests that the origin of the *laissez-faire* principle can be traced back to the eighteenth or even the seventeenth century.

[2] Williams & Norgate, 1884.

having democratic forms of government, with the natural consequence, that self-appointed dictators compared, to their own advantage, the rough and ready methods of the court martial with the ineffectiveness of orderly methods.

STATE ACTION TO REDRESS STATE-CREATED EVILS

By Mr. Lippman points out, with great justice, that these abuses and oppressions are, in a large number of cases, only rendered legal, and, therefore, immune from redress without alteration of the law, by a misuse of State-created institutions themselves, dating, perhaps, from the pre-*laissez-faire* epoch. Thus, for example, the long series of frauds connected with "share-pushing," false balance sheets, "rigging the market," and the like, could hardly have been perpetrated, but for the existence of the limited-liability company, which is not a primordial product of Nature, but the deliberate creation of nineteenth-century legislation. Other cases are not so easy to trace to State action, especially in England, where, as will be explained (pp. 126, 127) the doctrine of judicial precedent often supplies the lack of legislation Thus, for example, it is believed that no Act of Parliament and no actual judicial decision till recent years laid it down that the owner of the surface of the soil is, in the absence of proof to the contrary, entitled to all minerals below it (other than "precious metals") to an unlimited depth. This can hardly be considered a self-evident proposition. Yet in the famouse *Case of Mines*,[1] solemnly decided in the sixteenth century by the King's Judges, it was assumed without argument that all minerals (other than "precious metals") belonged to the owner of the surface above them; and the doctrine became firmly established by means of the theory of judicial precedent. Thus the State, consciously or unconsciously,

[1] The question in the *Case of Mines* was, which metals were "precious," and, therefore, the property of the Crown.

created the doctrine, with all its immense economic consequences It is institutions such as these that Mr. Lippman's view would entitle the State, which created them, to remodel on modern lines, without an undue interference with economic policy, and, presumably, with due regard to the interests created in reliance on the doctrine. When the number of State-created institutions which have given rise to abuses is considered, the scope of what Mr. Lippman calls "liberalism" is seen to be fairly extensive.

But it may be fairly asked, if, in the social or economic system, abuses not due to State action arise, is there no machinery by which they can be put right? Mr Lippman, as we understand him, would say: "Yes, it is to be found, since the Industrial Revolution, in the international market"[1] One great effect of the Industrial Revolution was to establish this market, which, by its index of prices, automatically corrects faults in the world of industry If a new product is really desirable, it will command, in the international market, a price which will enable it to be made at a profit If not, the absence or insufficiency of demand will render it unprofitable to produce it, and it will disappear The international market was not the deliberate creation of any man or State; it grew up as a spontaneous agency for reporting upon the world's desires, and is thus, *ex hypothesi*, more acceptable to people with "liberal" ideas, than systems of "planning" enforced by autocrats. If confronted with the fact that, in more than one highly industrialized country, enforced planning has been resorted to, Mr Lippman would probably reply, that this is because evil-minded persons have deliberately wrecked the international market

It is a plausible theory that Mr. Lippman puts forward; and there will be few liberal thinkers who will complain that he has gone too far The question rather is Has he gone far enough? As he himself seems to admit,[2] the

[1] *op cit*, pp 170-1
[2] *op cit*, p 172

action of the international market is often harsh and crude, causing real unhappiness, and even misery, among men ; for instance, by throwing them out of work and replacing them by machines. Is there to be no remedy for such evils ? Must they be regarded as the inevitable price to be paid for the increase of production ?

NOT A COMPLETE ANSWER

It is not difficult to suggest at least one or two ways in which, though they cannot well be brought within the limits of Mr. Lippman's test, something might be done to mitigate the hardships arising from the operation of the international market. One of them is the way of insurance, which has already been tried with substantial success in more than one direction. The members of a community such as a nation have, as indeed their name implies, a sufficient sense of unity to make sacrifices for the less fortunate among them who have fallen by the wayside. Even the crude old Elizabethan system of Poor Relief, though ultimately ruined by the abuses with which it was accompanied, was a recognition of this fact. The greatly improved modern State systems of Health and Unemployment Insurance which this generation has seen set up in England and other countries are based on thoroughly scientific principles, and, despite the opposition aroused by their novelty, are now, it is believed, accepted as legitimate, if not exactly popular, by the nation. Yet it would be difficult to bring them within Mr. Lippman's permitted State activities ; for they are certainly not confined to the reform of State-created institutions. It is even doubtful whether they can fairly be considered as taxation. Unemployment insurance is, for example, in the nature of a licence to two persons, the employer and the employee, to enter into a contract the failure of which may entail unpleasant consequences for at least one of them ; and for this licence a modest fee may fairly be demanded, even

if it should fall under Mr. Lippman's disapproval, as savouring of a "plan."

Again, the test of the international market seems to be not the highest possible test of utility or value. Price, according to the technical definition of political economy, is value expressed in terms of money. But there are some values which cannot be expressed in money. Is the State to be precluded from securing these for the nation, because the methods adopted do not fall within Mr. Lippman's test of the reform of State-made institutions? Are all subsidies for such objects as education, health, better housing, or the advancement of learning, to be condemned on this ground? The question almost answers itself. And yet such subsidies can hardly be administered without a certain amount of "planning," which rests ultimately on the coercive power of the State.

CHAPTER VI

Forms of the State

THE bewildering political experiments tried in Europe during the present century, mostly as the result of the Great War, have made the old-fashioned classification of States into Monarchies, Aristocracies, and Democracies entirely inadequate as an exhaustive classification of forms of government. It had, probably, never been really adequate for any period subsequent to the downfall of the Roman Republic; being based on the assumption of the City State as the normal unit in politics. Moreover, for many centuries after the break-up of the Roman Empire, it was a classification which laboured under the disadvantage of ranging practically all its members under one head; the tiny Republics of Venice, Florence, Siena, and Genoa, survivals of the ancient system of City States, being almost the only non-monarchical States exercising real independence, though whether they were properly classed as Aristocracies or Democracies it is difficult to say. The territorial Republics of modern times make their appearance, as has been pointed out, only in the seventeenth century, whilst the most modern type dates from the French Revolution in the eighteenth. Its distinguishing mark is, of course, that it is represented internationally by a President or other Head elected by a more or less popular vote, almost invariably for a definite and comparatively short period; while the typical monarchy of the medieval period was hereditary, though elective monarchs were not entirely unknown.

SURVIVAL OF MONARCHIES

Perhaps one of the most surprising things in the post-war political map of Europe is, not that so many monarchies have disappeared, but that so many remain. The fall of the Hohenzollerns, the Wittelsbachs, and the Habsburgs in Germany and Austria, and the Romanoffs in Russia, is apt to produce the impression that monarchy is a thing of the past. Actually, there are at the present time (1939) at least eleven persons in Europe who are entitled to call themselves monarchs ;[1] and though, in some cases, these persons cannot claim, internationally, at any rate, all the privileges and powers associated with the historic monarchies of the later Middle Ages, yet the presumption is that, so far, at least, as forms are concerned, these powers and privileges are still observed. Nor is it even safe to assume, that, in these monarchies, the actual powers exercised by their rulers are a mere shadow of those they enjoyed before the War. On the contrary, it would be quite plausible to argue that, in some cases, these powers have very considerably increased If we add that, even in some self-styled Republics, e g Turkey and Russia, such powers are exercised by their professedly elective rulers to an extent far in excess of those exercised by most so-called "kings," we must admit that the monarchical principle still plays a very large part in the orgnaization of European States

On the other hand, new Republics, with at least nominally elected Presidents or Chiefs of States, have appeared in Germany, Czechoslovakia, Poland, Spain, Russia, Portugal, and the liberated territories of Tsarist Russia—Finland, Esthonia, Latvia, and Lithuania on the coast of the Baltic Sea, while the now old-established Republics of France and Switzerland have remained true to their faith, though Holland, one of the pioneer modern Republics,

[1] The rulers of Belgium, Bulgaria, Denmark, Greece, Great Britain, Hungary (vacant throne), Italy, Netherlands, Norway, Rumania, Sweden, Yugo-Slavia.

changed its form of government to an hereditary monarchy over a century ago.[1]

REPUBLICS IN AMERICA

In the New World, which has taken so many of its political institutions from Europe, the Republican ideal has, of course, been far more completely realized. South of the Treaty Line which separates the United States from Canada (and, indeed, in one remote but important corner north of it) the whole continent professes Republican government.[2] Whether any attempt to revive the older so-called monarchies of Mexico and Brazil, or to convert any of the other Republics of South America into Kingdoms, would be held to violate the famous Monroe doctrine, which was in terms directed only at European interference in American affairs, it is difficult to say. There can be little doubt that such an attempt would arouse lively apprehension in the United States.

But, after all, when the States of the Western World have been divided into Monarchies and Republics, the division really tells us very little of importance. Perhaps, in theory, the rule that, in a monarchy, all officials who represent the State are assumed to derive their authority from the monarch, and can, for the most part, legally be dismissed by him at his pleasure, while, in the case of a Republic, they derive their authority from the Constitution, and may be independent of a personal ruler, seems a fundamental difference. But though, in theory, all State officials in England hold their offices at the royal pleasure, there is one very striking exception in the case of the higher judges, who, though they are appointed by the King, and administer justice in his name, cannot be dismissed by him without the concurrence of Parliament. There are also

[1] The number of European Republics (if Russia be counted as one) appears to be eleven, just one less than the Monarchies

[2] There are fourteen Republics in South America But, in more than one of them, the President has semi-dictatorial powers.

one or two other rare cases, e g. the Comptroller and Auditor General

On the other hand, there are few who would deny that the President of the United States has, in fact, a far greater share in the choice of executive officials and in framing the policy of the Executive, than falls to the lot of an English monarch, while again, the President of the French Republic occupies a position which more resembles the latter than that of the President of the United States. Evidently the classification of States into Monarchies and Republics does not go very deep into the heart of things; and it is not surprising that it has ceased to attract the interest which it aroused as late as the middle of the nineteenth century.

CONSTITUTIONS

The scheme which (amongst other things) fixes the form of a State is known in English-speaking countries as the Constitution In most of the countries of the Western World, the Constitution of the State is embodied in documents, not necessarily a single document. These countries are said to have "written Constitutions"; and most of these written Constitutions expressly or by implication forbid the exercise of certain powers by the institutions which together make up the normal form of the State Consequently, any exercise of its functions by any of these institutions which violates the terms of the Constitution is said to be "unconstitutional," and may, therefore, be disregarded by individuals whom it professes to affect. In some cases, provision is made in the Constitution for a possible alteration of its terms by an appeal to some authority which is deemed to be the depository of that ultimate sovereignty of the nation which, as we have seen (p 15), is held to exist in every independent State. In most cases, this appeal is somewhat complicated in character, and is rarely made It is, undoubtedly, useful as a safety valve, which may provide a peaceful escape for the passions

which arise when a large section of the community is violently opposed to the policy of those persons who are, for the time being, exercising the functions of the State, and thus avoid civil war. A simpler expedient is the reference to a tribunal which inspires confidence in its ability and impartiality, and can at least pronounce whether or not there has been a breach of the Constitution —a decision which may go far to allay public excitement. A conspicuous example is, of course, the Supreme Court of the United States of America

It is well known that one of the many peculiarities of the Constitution of Great Britain is that it nowhere can be found, in its complete form, in any document or group of documents. There are, no doubt, more than one Act of Parliament or other document of authority which lay down British constitutional principles of greater or less importance ; and any conduct by a State official which violates any of them is, in the strictest sense, not merely unconstitutional but illegal, and, subject to Parliamentary or other exceptional privilege, may entail legal proceedings against the official committing it. But, as has been pointed out in an earlier chapter, there are important rules of English constitutional law which do not appear in any formal document at all.

The result of this state of things is curious. If the act of the State official is of a kind which, apart from constitutional questions, would be a crime or a civil offence, such for example as an assault on a private citizen or an interference with private property, he (the official) must submit to punishment or the payment of damages, as the case may be. From the first he is on the defensive. It is not for the complainant to prove that his (the official's) act is unconstitutional ; it is for the official to prove that, by constitutional law, it is justified. And the decision lies with an independent and highly trained judge, who does not in the least stand in awe of the representative of the State, even though the latter pleads "superior orders," i.e. the

direction, possibly, of a Secretary of State In a well-known case which occurred towards the end of the eighteenth century, the accused official pleaded in defence a long-continued practice of successive Secretaries of State, in addition to the evil results which would follow from an adverse decision. But he was met by the dry remark of the Chief Justice who was trying the case . " If that be so, Parliament may make it lawful "[1]

The remark of the Chief Justice puts the matter in a nutshell, and illuminates the character of a State with an " unwritten " Constitution. It may well be that, in a case of the kind just described, the conduct of the official was not only quite *bonâ fide*, but actually in the interests of the community as a whole. But it was a breach of the law ; and there is but one body which, in England, can openly alter the law No Secretary of State, not even the King himself, can alter the law ; that is a matter for Parliament alone. If it is really desirable that a gap in the law should be filled, Parliament can fill it, without searching a written document to see whether it has power to do so But it is one thing to persuade a high official to increase the powers of his subordinates, and quite another to persuade a representative body, consisting of several hundred persons, in a matter touching the liberty of the subject, to impose restraints on that liberty Such a measure could only be introduced, with any hope of success, as a Government Bill, a fact which would at once arouse the vigilance of an organized body in Parliament itself, whose main business it is to criticize the Government, and of a Press which is equally vigilant . It is not, of course, suggested that this Rule of Law, as it is called, is peculiar to the English system , the example of the United States of America is equally clear, despite its written Constitution But it is in striking contrast with the doctrine of many other countries,

[1] See the cases associated with the name of John Wilkes, reported in 19 *State Trials*, especially *Leach v Money*, *Wilkes v. Wood*, and *Entick v. Carrington*

Republics no less than Monarchies, where the plea of "act of State," or its equivalent, is a complete answer to a complaint by a private citizen of the action of a representative of the State.

UNITARY AND FEDERAL STATES

A classification of far greater importance than that into Monarchies and Republics, is that which distinguishes unitary from federal States; and the growth of federalism, in its various forms, has been so striking a feature of the last century, that it is worthy of careful attention.

In a unitary State, the authority of the central government extends, without question, to every part of its territory. That is not to say, of course, that all persons in every part of the territory are in fact directly under the control, for all purposes, of the central authority, even of a unitary State. In England, for example, which is a typical example of the unitary State, there are local authorities which exercise, as has been previously explained, large powers over the inhabitants of strictly defined areas—counties, boroughs, sanitary districts, and the like; and, as a matter of history, some of these authorities, or those whose functions they have taken over, are as old as, or even older than, the State itself. But, even where the powers of such local authorities have not been expressly conferred by the State, it is admitted that they are held subject to the ultimate control of the State, though the amount of control which is, in fact, exercised, varies from country to country In some countries, notably in England, it is comparatively slight, being confined to a general supervision or periodical examination of the working of the local authority, and the necessity for the consent of the central government to the performance of certain specially important functions of the local authority, as, for instance, the pledging of the resources of the authority as security for a loan. Such States are sometimes described as "localized" or "self-govern-

ing" States. In others, which are described as "centralized" States, the powers of the local authorities are much smaller than those in the self-governing States; and their activities are much more closely supervised by representatives of the central government. Such has been the tradition in France, at least, even since the Revolution of 1789. The subject is difficult; because, in England, for example, the same area is occasionally to be found both as the sphere of a really independent local authority, and as a mere local area of administration by the central government. Thus an English "county" is an institution of local government with an elected Council having large independent powers, and, at the same time, a mere sub-department of the central government for the administration of justice. In a country with a long and substantially unbroken political history, such anomalies are inevitable.

But, as has been said, the essence of a unitary State is that, by one lawful means or another—legislation, administration, judicature—the central government can control all local organs, and, as it pleases, effect any change in their powers, except, of course, insofar as it is forbidden by the terms of its own Constitution.

In a federal Constitution, on the other hand, it is of the essence of its nature, that, in addition to the federal Government, exercising authority throughout the whole territory of the federation, there should be a number of units whose powers of self-government are independent of the powers of the federal Government, and incapable of control by the latter, at least without the consent of such units. To the world outside the limits of the federal territory, the federation stands as a single State; but, within that territory, the federation is a group of States, the relations between them and the federal Government, and between themselves, being fixed by the terms of the federal Constitution. Naturally, these terms differ in different federal Constitutions; but, as has been said, they are all characterized by the fundamental principle, that they

cannot be altered without the consent both of the federal Government and the Governments of the units, whose powers are proposed to be altered.

As a matter of history, federal States fall into two well-marked classes In the first, which includes the conspicuous examples of the United States of America, the Australian Commonwealth, the Republics of Brazil, Mexico and Venezuela, and the Swiss Republic, specific powers are allotted to the federal authority; while the "residuary" powers of government are exercisable by the Governments of the respective units, which are usually known as "States." In the second, of which the Dominion of Canada and the Union of South Africa[1] are examples, specific powers are allotted to the constituent units, usually known as "Provinces"; while the residuary or undefined powers are exercisable by the federal Government. But in both cases, neither the federal Government on the one hand, nor the respective units on the other, can alter the terms of the relationship, except by mutual consent. In these cases, too, it is usual for the legislation of the provinces to require at least the formal assent of the Head of the federal State; and, generally speaking, the preponderance of the federal over the provincial authorities is more marked than in the former type, where the federal power is more restricted. Still, the powers of the provinces, whatever their limitations, cannot be over-ridden by the federal authorities, unless provision for such over-riding is made by the Constitution itself.

Before we leave the very important subject of federation, two additional features which characterize it may be briefly referred to.

The first is, that the birth of a federal State is the nearest

[1] In the case of South Africa, it is said that in a strict view of the Constitution, the powers of the "provinces" are alterable by the Union Government without their consent, and that South Africa is really a unitary State. But, for practical purposes, this view may be disregarded Its force has been lessened by the passing of the Statute of Westminster enacted in the year 1931, by the so-called "Imperial Parliament."

approach made in practical politics to the realization of the philosophical theory of a Social Contract (p 43). It is practically impossible for such a delicate organism as a federal State, with its absolute necessity for mutual and friendly co-operation, to be brought into existence except by the mutual agreement of all its units The underlying motive for its formation has been happily described as a desire among previously independent States for union but not unity; it being understood that the word "independent" has reference to the States *inter se*, and not to independence of external authority For one of the striking features of the history of modern federation is, that it has taken place amongst States which are, nominally, at least subordinate to a higher authority which controls them all. But a desire for united action is at the root of every contract, even if a contract is usually understood as an arrangement betwen individuals, rather than States.

In the second place, the existence of federal States makes a serious inroad upon the theory of internal "sovereignty" (p 32), for it is impossible to find, in any true federal State, any person or body whose authority over its citizens is unlimited and illimitable. In a unitary State, such as England, a true body may, doubtless, exist whose authority none can question. But it is common knowledge, that any exercise of authority by a federal organ may be, and frequently is, challenged as "unconstitutional," i e beyond the scope of its powers, and, by the appropriate tribunal, set aside as *ultra vires*, as also any act of a State or Province within a federation

FIXED AND PARLIAMENTARY EXECUTIVE

The next classification of forms of States which we may notice is that which divides them into States with fixed

[1] e g in the federal Constitutions of Australia, Canada, and South Africa, which are actually embodied in Acts of the then "Imperial Parliament" at Westminster, though in fact, these Acts were really framed in accordance with the wishes of the Dominions themselves

and Parliamentary Executives respectively. Ever since the French Revolution of 1789, almost every State in the Western World which claims to be civilized has recognized the necessity of setting up some kind of a representative body which is supposed to be able to express the wishes of the national community which it professes to govern. Even in Russia and Germany, whatever be the facts of the case, there are, in theory, bodies of this kind; though it need hardly be said that in degrees of importance they vary almost immeasurably. And, in almost all cases, these representative bodies have, in theory at least, the power of legislation, which, subject, in the case of States with "written" Constitutions, to constitutional limitations, is assumed to be the supreme expression of the national will. But it is, obviously, impossible for bodies consisting, usually, of large numbers of individuals most of whom are of little political experience, to exercise all the functions which go to constitute State activity. Such a body cannot, by its very nature, exercise what are called executive functions, i.e. the enforcement in individual cases of the legislation which it enacts [1] Nor can it, except on rare and solemn occasions, exercise the delicate function of interpreting the exact meaning of that legislation in its application to the huge numbers of individuals comprised in a modern nation.

For this last function there is need for a body of trained experts; and, accordingly, every modern State recognizes the necessity for the existence of a distinct body of officials known as judges or magistrates, some charged exclusively, others occasionally, with the task of judicature. Finally, with the enlargement of the sphere of the State's activities which has been so marked a feature of the politics of the last century, there has arisen another distinct branch of the organization of the State, which is generally known as "administrative," though it is still common, in treatises on

[1] e g a Parliament consisting of over a thousand individuals could hardly in person arrest an individual on a charge of common assault.

political science, to treat it as included in the executive branch. For functions of this kind, Parliaments and other representative bodies are not so obviously disqualified For the essential qualities of administration are the exercise of discretion and common sense ; and these qualities are by no means lacking in representative bodies But, apart from obvious difficulties such as the time involved in settling the details of administration, any attempt to do so by a legislative body would probably involve a serious danger of corrupt pressure and bargaining, more especially as administrative functions frequently involve the allocation of large sums of money among rival claimants A fuller description of the various groupings of the State machinery more properly, however, belongs to the next chapter.

THE SEPARATION OF POWERS

If these various considerations are taken into account, it will hardly be a matter of surprise, to find that there has long been a doctrine, usually associated with the names of a great French philosopher of the seventeenth century, and the English philosopher Locke, known as the " separation of powers," which achieved much popularity at the time of the French Revolution Curiously enough, Montesquieu and his successors based their recommendations largely on the example of England, where, in fact, the separation of powers between the Executive and the Legislature, which Montesquieu praised as a safeguard of the liberty of the subject, did not then exist ; having been superseded by a system so curious and original, that it was invisible to the eyes of even highly competent foreign observers. But the doctrine of the " separation of powers " was welcomed by the conservative elements in the European States whose rulers viewed with alarm the progress of Parliamentary institutions, and were unwilling to admit that executive authority, already vested in themselves, should be shared with, or even be effectively criticized by, the then new-

fangled representative bodies. In fact, such rulers regarded these bodies, with some historical justification, as mainly tax-granting bodies, or, at most, as centres for the respectful presentation of "grievances." That a monarch should be forced to change the personnel of the official body which carried out his orders, at the request of his Parliament, they regarded as a wholly unwarranted encroachment on his authority; and they found the doctrine of the "separation of powers" a most useful ally of their convictions. What is, perhaps, even more remarkable, the doctrine was loyally accepted by the Fathers of the American Revolution, and incorporated into the Constitution of the United States, where the "fixed Executive" holds sway to the present day. It must be admitted, however, that, despite its practical inconveniences, the doctrine of the fixed Executive is far easier to justify in the case of a President elected by popular vote, than in that of an hereditary monarch.

But it is fairly obvious that the fixed Executive is not a satisfactory solution of the problems of government, especially if we accept the view, now becoming almost universal, that the object of the State is to carry into effect the will of the community. One very strong objection to it is, that it may result in a deadlock, if the policy of the Executive and that of Parliament are in opposition Doubtless, the legislative body may, if the assent of the Executive is not required for its legislation (which it usually is), by enacting laws in a contrary sense, render illegal certain acts of the Executive, and thus, if the judicature is independent, put a stop to any repetition of them. But a sullen or hostile Executive will find ways and means of evading these prohibitions. Or, on the other hand, if Parliament enacts legislation of a positive kind, a hostile Executive will do its best to prevent such legislation taking effect by refusing to enforce it. Or again, by withholding information from Parliament on matters of which alone it has inside knowledge, the Executive may paralyse

Parliament's legislative efforts; and the only effective reply of Parliament will be the withholding of supplies—not always an effective, still less a patriotic policy. If, as has more than once been suggested in this book, government is a compound of authority and co-operation, it is an elementary principle of statesmanship that these two elements should not be kept in water-tight compartments, but that the Executive, which, to the ordinary citizen, is the vehicle of authority, should work in harmony with Parliament, which is, or should be, the vehicle of co-operation by the nation. It was exactly the failure to realize this harmony which was the chief source of the inherent weakness of the German Empire of 1870; and it is, perhaps, the greatest contribution which England has made to the political practice of the Western World, that she has, by her characteristic method of trial and error, evolved a system known as the "Parliamentary Executive" or "Cabinet System," which, in the first place, provides for the harmonious working together of Legislature and Executive, with a minimum loss of dignity and efficiency in either, and a reasonable division of the functions of government between them. No candid student of the English system could describe it as perfect; but that it has proved a first-class contribution to political science, equally no candid student could deny.

THE CABINET SYSTEM

It is impossible to avoid treating the problem, to a limited extent, historically, for one of the chief sources of the strength of the English Cabinet System is the fact that it arose, at first hesitatingly, afterwards with increasing vigour, out of an historical problem of first-rate importance.

The Civil War of the seventeenth century had left two definite impressions on the mind of the English nation: first, that the House of Commons could, by its hold on the material forces of the country, definitely defeat any rival authority in the State which disputed what it (the House

of Commons) believed to be its just share in the government of the country. But, equally, the nation, or, at least, the most influential part of it, had definitely come to the conclusion, that the House of Commons alone could not, as it had claimed to do after the execution of the King, satisfactorily exercise all the powers of government. The establishment of the Protectorate in 1653, which, though it was directly due to the action of the Army, was acquiesced in by the nation, was largely influenced by this conclusion; though, doubtless, the pre-eminent and striking character of the first Protector contributed greatly to the acquiescence.

But when Oliver Cromwell died, the glamour which he had shed on an experiment which a growing majority of the nation regarded as a poor substitute for the traditional glories of the historic monarchy, rapidly made itself felt; and, as is well known, the nation welcomed back, practically without terms, the son of the monarch who had paid with his life for his failure to arrive at a *modus vivendi* with the powerful House of Commons. It looked as though the Civil War had been fought in vain; but that is a superficial view. For not only had the new King definitely waited for an invitation to return to his native country; but General Monk, in the historic march from Coldstream which was the first act in the Restoration drama, had expressly included in his brief manifesto, a demand for a "free Parliament." In other words, the nation felt that neither the King alone, nor the House of Commons alone, could undertake the task of governing England, but that both were necessary for its satisfactory performance. What it did not realize was, that the problem on which the Civil War had really been fought, viz. if these two partners in the conduct of the State should disagree as to their respective functions, who was to decide between them, still remained unsettled. The old view, for which there was a good deal to be said historically, that Parliament was but one of the several councils of the Crown, and that its advice could be rejected by the Crown, had died with the Tudors. But it

was still fully admitted, that the concurrence of the Crown was necessary to the validity of Parliamentary legislation ; and the notion that the so-called " royal veto " was a mere form, was still in the future.

The new King, a man of exceptional ability, had no desire to force a solution of this serious problem. He enjoyed the sweets of office far too keenly to risk losing them by a stupid insistence upon alleged rights which, though existing in theory, were certain, if pressed, to provoke acute criticism, and, ultimately, perhaps, a repetition of his father's fate He had suffered too keenly in the preceding twenty years to be willing even to run the risk of a renewal of his exile by aiming at a mere academic victory. Instinctively recognizing in the House of Commons his one formidable rival in the affections of the nation which had welcomed him back with enthusiastic, if somewhat hysterical, professions of loyalty, he was determined to find some better way of getting what he wanted from that formidable body than by threatening it with a file of soldiers after the manner of his father and the Protector.

The method which Charles II adopted, though we may question some of the means by which he accomplished it, was, in its essence, sound. He determined never to let a quarrel between himself and Parliament arise. If a proposal were put forward in either House which seriously touched his interests, he would take care that it was not carried If, on the other hand, he was anxious to secure from Parliament the approval of any measure which he desired, he would take steps to provide that his policy received ample explanation and support in Parliament itself These were much more desirable and conciliatory steps than even the undoubtedly correct methods, either of failing to summon Parliament together, or dissolving it if it failed to carry out his wishes, which were the inevitable alternatives

In other words, Charles resolved to govern by influence,

rather than by force. And, to do this, he had, necessarily, to secure that his views should be known and expressed, not merely by formal documents read by outside officials at the commencement of or during a session, but by members of the respective Houses themselves, who, at least *primâ facie*, might be expected to share the feelings of the Houses of which they were members. In the case of the House of Lords, still, at the end of the seventeenth century more influential (except in financial matters) than the Commons, it was quite easy for the King, and his undoubted right, to confer a peerage on any man who held office in his service, or any private person who was willing to charge himself with advocating the royal policy in the House. In the case of the Commons, there was, doubtless, a tradition, which had become more acute since the Civil War, against a member accepting office under the Crown; and members who did so were looked upon with suspicion by their independent colleagues. But there was then no law against it, nor against any constituency, if it saw fit, electing a royal official as its representative, if it chose And there were many constituencies, even after the Civil War, which would have welcomed such a candidate.

By these means, it was perfectly possible for the King to furnish himself with a staff of advocates in either House, whose votes and arguments might be used to harmonize the decisions of the House with the royal wishes Nor was it even necessary that these persons should actually be given office under the Crown; in fact, the influence of the unofficial supporters of the Crown might be even more effective than that of the officials, because it could pose as independent Whether, and, if so, what, inducements were held out to influence these unofficial advocates to undertake their somewhat invidious task, it is difficult to be quite sure. Needless to say, accusations of corruption were freely made, both by disappointed rivals, and by persons genuinely suspicious of any attempt to influence votes by pressure from outside the House. But, in the atmosphere of

the Restoration, it is not necessary to suppose, in most cases, any worse influence than flattery or social privileges. It is not easy to resist the personal request of a King, especially a King so gracious and diplomatic as Charles Stuart the Younger.

Throughout the reign of that monarch, this system worked fairly well, though there were occasional protests from members of the House of Commons, who perceived its dangers One very obvious danger was, that it gave the Crown considerable influence over Parliament, without giving Parliament any corresponding influence over the Crown Nothing that Parliament could do could compel the King to change his Ministers: though, if a Minister failed to persuade Parliament to further the King's policy, he might, for purely opportunist reasons, be replaced by another who might be more successful. Furthermore, some of Charles' own Ministers, such as Lord Clarendon, who had shared Charles' exile, disliked the growing importance of newcomers who took part in the system. The view of the older Ministers was, that all discussions of policy should take place in the Privy Council, the formal and legal body which, for many centuries, had been the authority for tendering advice to the Crown on matters of State These older Ministers found, to their disgust, that, at sittings of the Council, matters coming before them had practically been settled beforehand by informal discussion between the King and his newer type of representatives in Parliament, some of whom were not members of the Council at all, and that they (the Council) were merely expected to record a phantom resolution of approval, while the formal Orders which gave official expression to these resolutions, though professing to be made by the King, "by and with the advice of his Most Honourable Privy Council," did not really represent the considered view of the Council in the least

That this new practice was regarded as the keystone of the vital change from the fixed to the Parliamentary Executive, is clear from a curious but little known chapter in

English constitutional history. For when it was necessary, after it had become clear that the new dynasty established by the Bill of Rights in 1689 would fail on the death of Queen Anne, and an Act of Settlement was accordingly passed to provide for the accession of the House of Hanover, the Act was found to contain a clause providing that, from the time that Act took effect, " all matters and things relating to the well governing of the Kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same."

Had this enactment taken effect, it would have been impossible for the new system, the essence of which was that the royal policy should be put forward in Parliament by Responsible Ministers before being discussed elsewhere, to continue in existence ; because it would have become known to potential opponents. Happily, when the question of the new succession came again before Parliament in 1706, the Privy Council clause was dropped, and the long vexed question of the " Place Bills " was settled by a modification of the clause in the same statute which in principle excluded from the House of Commons all holders of offices under and pensions from the Crown. But this modification was vital ; for, instead of simply excluding entirely all Crown officials from the House of Commons, the new Act expressly allowed such of them as could secure election (or re-election) after their appointment. On this famous compromise, modified in some ways by subsequent legislation, rests the fundamental principle of the Cabinet System, viz that the policy of the Executive shall be subject to continual Parliamentary oversight and approval [1]

[1] It is true that a way out of the difficulty could have been found by a drastic purge of the Privy Council whenever a new Ministry was formed, for each Privy Councillor holds his membership of the Council at the King's pleasure. But the remedy might have been worse than the disease The necessity for re-election was not finally repealed until the present century.

THE PARTY SYSTEM

Meanwhile, however, a new and important element had been introduced into the English political atmosphere. In spite of the fact that the invitation to King William, which was the first formal step in the Revolution of 1688, had been signed by persons representing all shades of political opinion in England, it was, after William's arrival, soon found that active politicians were divided, roughly speaking, into two groups or Parties. The one, called "Tories" by their opponents, regarded the Revolution as a political necessity to be interpreted in such a manner as interfered as little as possible with the hereditary prerogatives of the Crown, the other, likewise named by their opponents "Whigs,"[1] regarded the Bill of Rights as a charter of liberties marking a great advance in political evolution Each of these Parties began to organize itself throughout the country, principally with the object of securing a majority at the recurring elections to the House of Commons In order to carry on these campaigns, each Party had, naturally, to provide itself with a plan or policy, with which to appeal to the electors The electoral struggle was, equally naturally, carried, after the elections were over, into the debates in the House of Commons; and, after a period of resistance by King William, who greatly disliked having his Ministers in effect chosen for him by the majority in the Commons, it was gradually established, towards the end of the reign of Queen Anne, that, on the defeat of a Ministry in the House, the monarch should invite the victorious Party to "form a new Ministry," i e. a group of new holders of the principal offices of the Crown, by whom, it was assumed, the monarch would be advised in matters of executive policy Meanwhile, as a concession to the purists who feared the actual procurement of majori-

[1] A "Tory" is said, in the language of the day, to have been an Irish bog-trotter, or vagrant highwayman, a "Whig" a Scotch covenanting divine, whose bitter discourses turned milk sour Both were, of course, terms of abuse

ties in the House by a monarch "packing" it with holders of minor Crown offices, it had, after many unsuccessful attempts, been enacted, as has been said, by the Act of Succession of 1706, that all holders of Crown offices, with the exception of a few offices whose holders were actually intended to frame the policy of the Government, should be excluded, under severe penalties, from sitting and voting in the House of Commons. The few excepted persons were intended to present the policy of the Government for the approval of the House; but they were too few in number to secure a majority, unless backed by large numbers of unofficial members of their own Party.

Thus the essential features of the "Cabinet System," the object of which is to secure harmonious co-operation between the Executive and the Legislature, gradually came into existence. It is assumed that the Crown, the Head of the Executive, acts, in political matters, on the advice of his principal officers of State, represented by their leader, the Prime Minister, who held, until quite recently, no formal office as such, and, therefore, was often said to be "unknown to the Constitution." So long as he does so, provided, of course, that he does not violate the law of the land, the King is personally free from responsibility—a fact which has enormously increased both the popularity and the stability of the Crown as an institution. On the other hand, the policy of the Crown is framed by a small body of the higher officers of State, "the Cabinet," also said to be "unknown to the law," who are officially described as "His Majesty's Servants,"-when so acting. They, however, along with a larger group of minor officers, who "stand or fall with them," in fact hold their positions only so long as they command the steady support of the majority of the House of Commons. The moment it is clear that they fail to do so (and there are more ways than one in which the House may express its disapproval) they are bound (subject to one alternative) to tender their resignation of their offices to the King, to make way for their opponents, who,

ex hypothesi, represent the views of the majority of the House. The one alternative alluded to is what is known as an "appeal to the country," a precedent introduced by the younger Pitt in the year 1784. In plain language, instead of offering their resignations, Ministers advise the King to act on his undoubted prerogative of dissolving Parliament and ordering new elections. If in these elections, by returning to the House a majority in favour of the policy of the Ministry, the electors show that they still regard the Ministry with approval, the latter retain their offices, and carry on with new confidence. If they fail to obtain a majority at the elections, they immediately resign their offices, which are distributed among the leaders of the hostile majority in the House of Commons, who then become the exponents of the policy of the Executive in the House, on the same terms as their predecessors.

These, in barest outline, are the essential features of the "parliamentary," as distinct from the "fixed" executive. Many countries, including, notably, all the self-governing Dominions of the British Commonwealth, the Republic of France, and the Kingdoms of Scandinavia, Holland, and Belgium have adopted it; though, naturally, with variations in detail. So far as the writer knows, it has never been attempted to embody it in any formal document; though learned treatises have been written on its working. Its great achievement has been to bring together, in working harmony, the two elements which, as has been more than once suggested, are the essential elements of sound government—authority and co-operation. It has many weaknesses of detail; but the very absence of rigidity in it renders it comparatively easy for these to be corrected without destroying its essential features. At least it goes far to prevent any justification for violent and forcible revolutions; for it enables any revolutionary element to submit its plans, in a peaceful manner, for acceptance of the nation.

CHAPTER VII

Departments of State: (a) Legislative and Executive

IT was mentioned, incidentally, in a former chapter (pp. 82, 83), that, in practice, the functions which the State, in fulfilling its function of government of the nation, may be called upon to exercise, fall into four main groups, known respectively as legislative, executive, judicial, and administrative; the last group having only in recent years, and still, at least in England, incompletely, severed itself from an older, the executive group. It is not, of course, pretended that the separation between the individuals who, in fact, exercise these respective groups of functions are rigidly and mutually exclusive. On the contrary, as has been recently pointed out, the working of the Parliamentary Executive almost inevitably involves the same individuals being closely concerned with the working of more than one department. Nevertheless, the character, rights, and duties which belong to such individuals in their different capacities, are distinct. The fact that such a distinction is possible is due to the nature of the State as an institution, or group of institutions, and is one of the advantages of such a character, as compared with a system of personal government. It is true that this advantage has its countervailing dangers; but these will usually be found to be due to a survival of the older, unregulated, forms of personal government.

The fact that, among the four traditional departments of State, the legislature should, at any rate in democratic countries, generally receive first mention in any formal enumeration, is really suggestive; though to the modern

man it seems to need no explanation For it is well known to students of legal history, that *legislation*, i.e. the conscious laying down of general rules for the conduct of the community, intended to be literally obeyed, is a comparatively modern feature of political history The view, now regarded as a commonplace, that any individual, or body of individuals, could deliberately enact a new rule of conduct, with any chance of having it accepted or obeyed, would, in the earlier stages of that history, have been looked upon, if the possibility of it were admitted at all, as blasphemous For the earliest views of the nature of law, in so far as they can be reconciled at all, agree to derive its existence from some external, overwhelming power, to be obeyed at peril of infinite suffering and ultimate destruction In fact, curious as it may sound, primitive man's conception of law was much more like that of the modern chemist or biologist, than that of the modern lawyer or politician. It long survived in the medieval theory of a "Law of Nature," which despite the tragedies and failures attendant upon its history, played a considerable part in practical affairs until the end of the eighteenth century Primitive Man could understand an *order*, or command, given by a powerful chief or ruler, involving a specific act of obedience. But he could not grasp the notion of the authoritative enactment of a new rule of life Law had to be discovered, not made.

THE FOLK LAWS

The early settlements in Western Europe which followed the invasions which broke up the Roman Empire were speedily themselves followed by the appearance of a group or series of "laws" which, too hastily, have been assumed to herald an entirely different condition of affairs. These are, in fact, known by a name which, to modern ideas, suggest a great outburst of legislation They are the so-called *Leges Barbarorum*, the codes of the Franks, the

Visigoths, the Lombards, the Saxons, and other groups which effected more or less permanent settlements within the boundaries of the old Empire. But, if carefully examined, they are found to be very different from legislation, as the modern world understands it. A far more appropriate title for these codes is that of Folk Laws; for they do not, in fact, profess to lay down any new rules of conduct, but only to record, in peculiarly solemn form, the customs, brought from their native soil, of the invading groups. In other words, they emphasize the primitive view above referred to, that law is a thing which is discovered, rather than made. The chief difference is, that whereas, previously, the origin of laws was attributed to some mysterious source, now it is more frankly confessed, that it is the assumed immemorial observance of these laws by the members of the respective groups which gives them their authority, and that the supreme test of their validity is the fact that they are actually observed by the members of the groups. Doubtless, the assemblies which recorded them were presided over by some chief or prominent personage, often including one or more of the missionary bishops who were rapidly converting the heathen invaders to Christianity. And, doubtless, these eminent personages managed occasionally to slip in some new rule which they were anxious to see observed, or to omit some practice which they disliked; and this fact was an important hint of future changes. But such passages are easily detected by the expert eye; and, in the main, the Folk Laws are records of actual customs practised by the groups, which customs are assumed to be the best evidence of the immemorial antiquity and unalterable validity of the law. This practice, which occurred at intervals from the sixth century to the fourteenth, was known to French lawyers as the *enquête par tourbe*; and the phrase happily represents its exact character, viz. a recording of customs from the very mouths of the peoples who practise them. With the growth of great commercial centres, it was extended to these; and

the Town Laws (*Stadtrechte*) of the later Middle Ages are some of the last and most important of these Custumals.

ORDINANCES

Meantime, however, there had appeared on the scene a new type of law, destined to play an important part in the history of legislation. With the consolidation of the new feudal states of Europe under the aegis of the Holy Roman Empire (pp. 16-17) of Charles the Great and his successors, Western Europe had become familiar with Ordinances, or Decrees, put forward by the rulers of the new States, partly for the management of their military and civilian staffs, partly also to enable them to fulfil their elementary task of putting down occasional disorders, and maintaining their "peaces." These Ordinances were, for some time at least, regarded as purely temporary, and personal to their promulgators. As has been before pointed out (pp 27, 28), even their successors did not regard these Ordinances as binding unless confirmed or renewed by themselves—a view which radically distinguished them from the *permanent* and immemorial Folk Laws of the earlier type Doubtless there was a good deal of vagueness about the boundaries which separated the Law from the Ordinance; but that there was, by general consent, a distinction, is proved by the rather curious fact, that, in the few cases in which the feudal monarchs definitely ventured to make alterations in the ancient Law, they themselves described their innovations as *Capitula* (the general Latin description of the new type of enactment) *Legibus Addita* ("Chapters added to the Laws"). Doubtless, too, the revival of the study of the original text of the great *Corpus Juris Romani* of Justinian, with its *Codex* of Imperial Statutes, which took place at Bologna and elsewhere in the twelfth and thirteenth centuries, emboldened the new monarchs to enlarge the scope of their Ordinances, in reliance upon the maxim so prominently and boldly asserted in the Roman textbooks, that

" what pleases the prince has the force of law." Still, the tenacity of the older view of law was shown as late as the thirteenth and even the fifteenth centuries, by the curious series of " Mirrors "[1] in Germany and the Ancient Custumals of the French provinces, which, though really the work of purely private composers, were generally accepted as faithful restatements of the ancient Folk Laws.

ESTATES OF THE REALM

It was just at this juncture, viz. to be precise, in the thirteenth century, that there supervened a movement which was, ultimately, to produce legislation of the modern type. This was the movement which established Estates, i e. more or less representative assemblies, in many of the countries of Western Europe. The origin of the movement is obscure. Much is said to have been derived from the Ecclesiastical Orders of the Church which held periodical assemblies of the Heads or other representatives of their different " houses," often scattered over several countries, or even from such " Convocations " of the secular clergy as were permitted in various countries by the Holy See, even before the religious Reformation of the sixteenth century. These bodies not infrequently formulated " canons," or statutes, which they hoped might be accepted as general rules of conduct by the constituent bodies whose " proctors " (procuratores) composed them. Another view regards the representatives of the " Estates " as originally groups of hostages, seized, more or less by force, from various collective groups—counties, cities, and boroughs—whose quasi-corporate character could be regarded by secular rulers as responsible for the acts of their representatives. There is much in early Parliamentary history which supports this view, more particularly the stringent rules which compelled the selected hostages to give security for their due appearance in the national secular assemblies of

[1] The *Sachsenspiegel*, the *Deutschenspiegel*, and the *Schwabenspiegel*

Estates which made their appearance in Europe in the thirteenth century, e g. as the *États Généraux* in France, the Diets of the Empire and its constituent Kingdoms, known as *Reichstage*, the *Cortes* in Castile and Aragon, the *Riksdags* of Sweden and Denmark, and the *Storthing* of Norway Of all these, it is hardly necessary to say, the English Parliament was the most powerful and permanent ; and we have before seen (pp 32-4), that, by a clever wording of the royal writs which summoned it, care was taken from the first that the constituencies should place no restrictions upon the "power" which they bestowed on their representatives to bind them Thus, in fact, as has been said, was the theory of "Parliamentary sovereignty" established in England

Whatever may have been the case elsewhere, it is generally admitted that, in England, at least, the primary purpose of summoning the Parliament of three Houses[1] was to secure financial support for the King's policy. But, with the shrewd political instinct which has long characterized Englishmen, it soon became clear to the assembled Parliament, especially to the new and representative part of it, that a meeting of that body offered an unrivalled opportunity for petitioning for "redress of grievances" as a return for a grant of "supplies" The great argument was that, as the King should "live of his own" (i e on the income from the great Crown estates and the newly established Customs, or port dues), any grant by Parliament was of the nature of a "benevolence," and should be met by reciprocal generosity. Fortunately for the power of Parliament, it soon became clear that, owing to the fall in the value of money previously alluded to (pp 36-7) and the increasing business of the Crown, the King found it more

[1] The ancient "Great Council" of the feudal monarchy (Lords), the Convocations of Canterbury and York (which soon ceased to take an active part in the discussions), and the House of Communes (or Commons), representative of the shires and boroughs At first the two lay houses sat together, but, fairly soon, they separated, with the result that it became necessary to secure the support of each House for every measure

and more difficult to "live of his own"; and so Parliament, at first, no doubt, summoned to meet an exceptional emergency, became an institution, acting with more or less frequency, and the claims for "redress of grievances" became more and more regular and powerful. Some rather sharp practices on the part of the Crown officials, who, after promising redress of grievances in return for a grant, were found to be either in default or unsatisfactory in their mode of redress, led quickly to insistence on the rule: "redress of grievances before supply," by which English Parliamentary practice is still governed. Finally, somewhere in the fifteenth century, Parliament adopted the practice of putting into exact form or "Bill," the remedy which it desired for its grievances, on the understanding that it should receive the royal assent, if at all, in the precise form in which it was presented.

It should not, however, be forgotten, that it was not until some centuries after this stage had been reached, that the royal assent to a Parliamentary Bill became a matter of course. Historians are not agreed as to the exact date; but, roughly speaking, the end of the seventeenth century saw the complete disuse of the prerogative "veto." And it is not without significance, that it was just about this time that the Cabinet System, which as we have seen, enables Parliament and the Crown to work harmoniously together, came into existence. This system has, amongst its other virtues, that of enabling the Ministers of the Crown to avoid the unpleasant situation which would arise from an open difference of opinion between Crown and Parliament, by discouraging the progress of a Bill in Parliament to which the Crown is opposed. On the other hand, before this system was adopted, Parliament had the effective reply to an exercise of the Crown's right of refusal of other Bills, in the practice of reserving the Finance or revenue granting Bill until the closing days of the Session, and withdrawing it if its other Bills were vetoed.

Thus it will be seen that legislation in the modern sense

is really, at any rate so far as England is concerned, a combination of the "ordinary" power of the pre-Parliamentary monarchy, with the co-operating power of the nation as represented in Parliament And this history is still embalmed in the almost universal "preamble" or enacting formula of an Act of Parliament, which runs: "Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and temporal in Parliament assembled, and by the authority of the same." The one exception from this universal formula occurs exactly in the Finance Bill, the enacting clause of which is preceded by a paragraph which explains that "the Commons . . in Parliament assembled . . . have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned" It is, perhaps, to be regretted that another equally important element in the process of Supply is not included in the formula, viz that no grant of taxation by the House of Commons can be made except on a proposal by a Minister of the Crown itself, a rule which sharply distinguishes the English Parliament from many similar bodies elsewhere, in which unlimited proposals for national expenditure (and therefore national taxation) can be made by private members of the legislative body [1] It is not necessary to dwell on the importance of this rule from the point of view of extravagance, or even worse things.

The process by which the authority of the Head of the State, combined with the co-operation of the representative assembly, produced, at any rate in countries with Parliamentary institutions, legislatures of the modern type, is so familiar to the modern student of politics that its apparently illogical character is almost overlooked. Why should a body of this kind, summoned for the prosaic purpose

[1] It could easily have been done by inserting after the words "Your Majesty," the words "on Your Majesty's demand" But there is no doubt about the rule, which is embodied in the Standing Orders of the Commons

of granting, by taxation of its fellow-subjects, "supplies" to the ruler who summoned it, rapidly have resolved itself into a body which claimed the right to enact, sometimes without any limit, new rules for the conduct of the lives of those fellow-subjects? There appears to be no logical connection between the granting of taxes and the ordering of the life of the community, except, doubtless, that the levying of the taxes might, to a certain extent, alter the mode of life of the taxpayer. It is, of course, natural to suggest, that a century which witnessed the first appearance of representative institutions in Europe—a momentous step which was to change the whole character of politics—was also a century in which the European mind was in a condition of ferment, in which new aims, involving great changes in human existence, were struggling to emerge. If that were, in fact, the case, it is easy to suppose that the new type of assembly would be seized upon as an obvious and convenient instrument for introducing such changes. And there is much to suggest that such ferment did exist, e.g. the rapid foundation of universities throughout Europe, the influence of the East brought back by the Crusaders, the brilliant conjunction of Thomas Aquinas, the summer-up of the old learning, with Roger Bacon, the pioneer of the new. It may well have been, that the ferment of ideas thus produced had fostered an impatience with the old static life of immemorial custom, and a desire to make over that life in accordance with new ideas.

This is, perhaps, mere speculation. What is certain is, that the birth of modern legislatures marked a momentous stage in the development of the Western World. The nations, in effect, placed their entire future in the hands of these new bodies, giving them, as it were, a blank cheque on the development of their resources Looked at in another way, by the working of the new majority rule, unknown to the ancient world, the nations pledged themwith to model their lives on the changing views of perhaps

Thus ally determined majorities in these assemblies or

their constituencies. Looked at in a more prosaic way, they were creating institutions which would place their lives and property at the mercy of these bodies; and the cost of the modern State to the nation which it exists to serve may be gathered from the figures submitted from year to year by embarrassed Finance Ministers to indignant "Lower Houses" The philosophic anarchist, who regards the existence of the State as anathema, would probably scorn to measure the extent of its iniquity in terms of pounds, shillings and pence. But he might use less weighty arguments in support of his views. We must, however, now turn to the second of the traditional departments of the modern State, viz. the Executive.

THE EXECUTIVE

The tradition of the Executive with which the Parliamentary State started was, that its function consisted in enforcing the law On the eve of the appearance of Parliament in the thirteenth century, this tradition had already received a liberal interpretation Not only was the Executive the recognized interpreter of its country to foreign countries, including the vital power of making war and declaring peace, but it extended to the control of the armed forces of the State, the instrument by which its international policy was effected Finally, by its control of the police forces[1] and the administration of the higher justice, the Executive claimed to enforce the primary duty of its existence by maintaining internal order The control of the national revenue and expenditure was in its hands, subject, in the "free" countries, to the exclusive claim of the national assembly to vote taxation Further than this, the Executive claimed the large and vague power to perform any function clearly necessary for the carrying on of "government" generally, except so far as such function

[1] England, where the police were from time immemorial a local authority, was a rare exception.

had been wrested from it by the more successful of the various Parliaments. These "residuary" functions were the basis of the "royal prerogative" which long remained an inexhaustible store upon which the Executive authority could draw at need, and which it only grudgingly yielded, in countries in which Parliaments were active and successful. It even retained, as we have seen, under the name of "Ordinances" or their equivalents, a large power of what was really legislation, of the restricted kind known before the establishment of avowedly legislative bodies.

Even after the Great War, this vague tradition did not disappear; and it is remarkable to find, in the shower of "democratic" Constitutions which flooded Europe,[1] how much of this ancient prerogative was left with the new Heads of States; though, in the Republics, a considerable safeguard was introduced by the requirement that the "Head" should be subject to popular election for a limited period. In other cases, where it was desired to maintain the control of the Parliament over the policy of the Executive, the further step was taken of providing that the chief Executive officer should actually be elected by the Parliament: while in many cases it is provided that they shall be "*responsible*" to it, and only retain office whilst they enjoy its support. On the other hand, the peculiar feature of the English Cabinet System, which, in effect, actually requires Ministers to be members of Parliament, does not appear to have commended itself to the framers of the new Constitutions.[2] From the point of view of the harmonious working of the Executive and the Legislature, the superiority of the English principle is manifest. But there are critics who suggest that the actual presence of Ministers in Parliament tends to lessen the independence of

[1] These will be found set out in the valuable work of B Mirkine-Guetzévich *Les Constitutions de l'Europe Nouvelle*, Paris Delagrave, 1928.

[2] In one or two instances, it is clear that they may be, but the favourite device appears to be to require them to attend before the representative Assembly, and answer questions as to their policy.

the latter body ; and unconscious testimony to the soundness of this criticism is given by the practice of describing the Prime Minister as the " Leader of the House." In fact, amongst their other privileges, Ministers have an almost complete control of the time-table of the House of Commons, a control which of itself gives them very great power.

GOVERNMENT LEGISLATION

Another feature of the English system is the fact that, quite contrary to the original purpose of Parliament, much of the actual legislation enacted by that body was, from the very first, proposed, in detailed form, by the Crown itself, and is now known by the name of " Government Legislation " In the earliest times, these measures were often framed by the King's judges ; and this may be the reason why, by long established tradition, the judges are, at the beginning of every new Parliament, summoned to attend upon the House of Lords, not necessarily as members, but merely to give their opinions should questions of difficulty arise

The fact that much of the legislative work done by the new Parliaments which sprang up in the thirteenth century was, in substance, Government Legislation, was, if our general view of the evolution of the State be accepted, perfectly natural Historically speaking, the new legislatures had grown up as appendages to the previously existing monarchies , and, if the latter felt any doubts about the extent of their legislative powers, as expressed in their Ordinances, it was natural that they should seek to buttress the latter by securing for them the formal approval of their Parliaments But, in doing so, they ran certain risks ; for there is a well-known law of institutional development, for which it is not easy to find a popular name, but which seems to urge a new institution which has been permitted to share in the exercise of functions formerly exercised only by an older institution, gradually to demand the exclusive right

to exercise such functions. This is, in fact, what happened, in the case of successful Parliaments, notably in England, where, less than three centuries after the adoption of the "Bill in Parliament," the then greatest English lawyer, Sir Edward Coke, placed the sharpest restrictions upon the scope of royal Ordinances,[1] practically limiting their activity to enforcing and explaining existing law. In other countries, the old ordaining powers of the Head of the State were more successful in maintaining and enlarging their authority, e.g. in France, where the *Établissements* and *Ordonnances* of the Kings, which were practically the sole statute books down to the Revolution, were not submitted to the *États Généraux*,[2] or Parliaments, at all.

NEW TYPE OF EXECUTIVE LEGISLATION

But the later Parliamentary history of England was to witness what was, in substance though not in form, a startling revival of Executive legislation. For, with the organization, previously referred to (p. 89), of the active politicians of the early seventeenth century into well-defined Parties, each striving to secure a majority in the House of Commons, it became customary for the "managers" of these Parties to form plans or policies, in order to impress the electors with the merits of their candidates; and these policies (later known as "platforms") frequently consisted of, or at least, contained, definite promises of new legislation in the event of their propounders obtaining a majority at the elections With the extension of the fran-

[1] This is the famous *Case of Proclamations* (1610) 12 Co Rep. 74, in which the Court formally limited the jurisdiction of purely royal legislation The decision has been ever since accepted as conclusive The historian will not fail to notice that it followed shortly after the Tudors had effected their most revolutionary changes by means of Acts forced by them on their docile Parliaments

[2] The last meeting of the *États Généraux* before the Revolution was, in fact, held in 1614 It is, perhaps, permissible to see, in the willingness of the modern French Parliament to grant powers to govern by decrees, a survival of the impression created by the royal Ordonnances.

chise which took place in the nineteenth century, this practice became more and more pronounced, until, at last, the Party programme became the chief weapon in the electoral contest.[1] Quite naturally, the first duty of the victorious Party, on the re-assembling of Parliament, was to implement its programme by bringing forward Bills, whose discussion in fact occupied the greater part of the attention of Parliament, during the session. The "Private Member's Bill,"[2] the surviving representative of the ancient "Petition," is, of course, by no means a thing of the past But if half a dozen of these purely spontaneous measures pass into law during the session, private members (i e. individuals who do not hold Ministerial posts) consider themselves lucky. The time allotted to them is so small, that would-be proposers have to resort to the ancient appeal to the gods, in its democratic form of a "ballot for places," i e in the time-table of the House.

Thus, in fact, in England and many other countries, the Executive, the representative of authority, has regained far more than it has lost in the matter of legislation by the establishment of Parliamentary institutions It is true that it holds its authority on a precarious tenure, which may jeopardize, not only its legislative, but also its strictly executive powers At least this is so in countries with Parliamentary Executives, for these, defeat in the representative House means, not only the loss of the defeated measure, but, subject to such power of dissolution as the Ministers can exercise (*ante*, p 93), also a loss of executive office On the other hand, the constructive criticism of a House of deputies consisting largely of practical laymen, even where the criticism comes from the formal

[1] This practice has been a good deal modified by the formation of a National Government as the result of the economic crisis of 1919-30 It will be interesting to see whether it will be revived

[2] To be carefully distinguished from a "Private Bill," which is concerned only with localities or individuals, and has a peculiar procedure of its own The "Private Member's Bill" may deal with the weightiest public affairs

"Opposition," probably, in most cases, substantially improves the Bill. In the long run, a legislative measure which has run the gauntlet of Parliament is quite as likely to be wise as the Ministerial Ordinance, discussed only in the Department concerned. For it is an effort, not only of authority, but of co-operation.

If we turn from the legislative side of the so-called Executive to what are still its primary functions, we shall see that the exercise of these has also been profoundly modified by the growth of Parliamentary institutions, at any rate in democratic countries. In the days before Parliament, practically the only remedy open to the private citizen injured by the policy of the Executive, short of formal rebellion, was the presentation of petitions to the Head of the State, i.e. to the very authority whose officials were alleged to have injured the petitioners. It was not surprising that such petitions stood but a slender chance of success, even with wise monarchs who were shrewd enough to realize that outrages by their officials gravely imperilled their own popularity and safety.

QUESTIONS IN PARLIAMENT

It is exactly here, that the Parliamentary Executive (pp. 85-9), as distinguished from the fixed Executive, show its peculiar merits. It is one thing for the members of the latter to attend the meetings of Parliament on formal occasions, to give an account of their stewardship, or for formal messages to pass between the two bodies, and quite another for representatives of the Executive, themselves members of Parliament, to answer questions, whether put orally or in writing, on the minutest detail of subjects alleged to affect their departments. The ambitious member of Parliament, even if he is not one of the Opposition, is anxious, at any rate if he is an elected representative, to acquire merit by directing searching questions to Ministers, themselves, in all probability, elected members; especially

if these questions affect the interests of his, the questioner's, constituents And if the answers of Ministers are not deemed satisfactory, they may be followed by a threat to raise a formal debate on the subject on a future occasion, for which the rules of the House usually afford opportunity. In more serious cases, the answer may be followed by a motion of censure, the success of which automatically involves the fall of the Ministry, subject only to the possibilities of a dissolution (p. 93) It is true that, in most Parliaments, a Minister may excuse himself from answering a question on the ground that a disclosure of the answer would be prejudicial to the interest of the State, and that, if the Minister really enjoys the confidence of the House, the answer will be accepted But the refusal always at least incurs the risk of unfavourable comment; and the plea of "State secrets" is not one which a Minister is anxious, as a rule, to put forward. There can be little doubt that the practice of question and answer, at any rate in an elected House, is one of the greatest checks to which the Executive is subject in the course of its legitimate business; and many a Minister, to say nothing of his subordinates, will hesitate gravely before doing a rash, to say nothing of an illegal, act, lest a question should be put in the House about it.

THE CIVIL SERVICE

The work undertaken by the Executive in a modern State is so extensive, that the simpler arrangements of the feudal monarchy, with its small household of officials of the domestic type,[1] has long since given way to an elaborate organization of executive offices, each consisting of a staff, often very large, of "permanent" officials, ranging from

[1] These households are said to have been modelled on the Court of the Eastern Roman Empire at Byzantium (Constantinople) which survived, nominally at least, for centuries after the downfall of the Western (Roman) Empire In accordance with feudal ideas, most of them became hereditary, and, consequently, ceased to be effective.

highly skilled and educated persons to clerks and typists. The success of the Executive often depends very largely on the fidelity and industry of these staffs; and elaborate arrangements are made for the recruiting, grading, and control of them. It is impossible to find space for discussion of these; but it may be stated generally, that they are founded on a choice of two conflicting principles The one is, that the public service should be manned by persons who, whatever, technically, their legal position,[1] devote the main portion of their lives to their official work (not necessarily in the same office), being selected as a result of general educational training, irrespective of their political views, which they are expected to subordinate entirely to the direction and policy of their departmental chiefs, and rising by planned gradation in the service. The other, known somewhat invidiously as the "spoils system," maintains that a Government cannot expect to be well and enthusiastically served, except by officials of its own political faith Consequently, in countries where political activity is organized on Party lines, and where this principle is adopted, the defeat of a Government or Party is followed by a wholesale dismissal of executive officials appointed by it or its predecessors of like views, and replaced by adherents of the victorious Party. The distinction cuts across forms of the State. Until comparatively recently, the Republic of the United States was the typical example of the "spoils system"; but there has been substantial modification of it in recent years On the other hand, the English monarchy is, as has been said, the typical example of the "permanent system"

It should, perhaps, be mentioned, that countries with Parliamentary Executives are, by the nature of things,

[1] Technically, for example, English Executive officials other than Responsible Ministers (with very rare exceptions) hold their posts *durante bene placito*, i e they are liable to be dismissed without notice, at pleasure Nevertheless, they are the classical example of a "permanent civil service," and are never dismissed except for personal misconduct or incapacity.

required, as has been said, to make an exception for the Ministerial heads of the Executive services Inasmuch as they (the Ministers) hold their Executive positions by the very fact that they command the confidence of the more powerful Chamber of Parliament, they vacate their Executive offices (not, of course, their seats in Parliament) as soon as it is clear that they have ceased to enjoy that confidence In fact, their technical description, in English-speaking countries, is that they are " officials who are liable to loss of office on political grounds "

UNI-CAMERAL AND BI-CAMERAL LEGISLATURES

A consideration of the legislative and executive branches of the State's activity naturally leads on to a reference to a subject closely connected with these activities, viz the rival claims of one-Chamber and two-Chamber Parliaments or other legislative bodies. And this for two reasons. First, because of their number, for, even if we omit the countries, such as Germany, and Italy, where representative institutions have virtually ceased to function, there are at least thirteen bi-cameral legislatures in Europe alone,[1] while important examples outside Europe, such as the United States of America, Canada, Australia, New Zealand, and South Africa, show how widely spread is the institution Second, because the question of the form of the Executive, as we shall see, intimately affects the problems which arise out of bi-cameral legislatures. These problems may be summed up under two heads · (1) the methods of the creation of what is now generally known as the " Second Chamber," though its older name of " Upper Chamber " will give us a hint of the changes which have come about in recent years in political thinking ; (2) what

[1] Great Britain, France, Belgium, Czechoslovakia, Denmark, Hungary, Ireland, the Dutch Netherlands, Norway, Poland, Rumania, Sweden and Switzerland

powers are to be entrusted to these Second Chambers by the Constitution. For it is evident that, if there are two Chambers or Houses in the same State, each claiming independent powers of legislation, there must be some provisions for boundaries between them, or, at any rate for solving the "deadlock" which occurs if they disagree.

A valuable monograph on these closely-related problems has, comparatively recently, come from the pen of the Rt. Hon. H. B. Lees Smith, M.P.,[1] who has admirable qualifications, both academic and practical, for the task, and who, though he openly advocates the view, probably accepted by most democracies, that the purport of all constitutional arrangements should be to give effect to the considered opinion of the majority of the nation (or at least the electorate), is, within these limits, impartial in his arguments.

It will, perhaps, aid a discussion of the subject if attention be drawn at the outset to the fact that Second Chambers fall into two classes. First in point of time come what may be called the survivors of pre-Parliamentary Constitutions, of which conspicuous examples are the British House of Lords and the Hungarian House of Peers. These bodies, before becoming Houses of Parliament, had long careers as Councils of pre-Parliamentary monarchs; and, naturally, in addition to the dignity of age, they have traditions of the days when the difference between legislative executive, and judicial functions were imperfectly differentiated, and are, naturally, disinclined, whatever the changes of political orientation, to abandon some of their former privileges. For example, the House of Lords still claims to exercise judicial powers; and, by long tradition, the King's Speech at the opening and close of each session, is read within its precincts,[2] which thus be-

[1] *Second Chambers in Theory and Practice* George Allen & Unwin, 1923

[2] Notwithstanding that the Speech itself may be, and probably has been, composed by a member of the House of Commons

comes as it were, the forum of the Executive. But it is equally true, that most of the existing Second Chambers are of quite modern creation, including even those of the ancient Scandinavian Kingdoms ; so that the problems of their composition and powers have a distinctly modern aspect, though the question of their "reform" is very different from that of the restriction of the powers and privileges of bodies older than Parliament itself.

It has been already stated, that the questions which arise about a Second Chamber usually fall under one of two heads, viz (1) the composition of the Chamber, and (2) the powers to be entrusted to it. Unfortunately, when these questions are discussed together, it usually turns out that neither can be answered until the other has been answered [1] If, for example, the Second Chamber's real function, as in Mr Lees Smith's view, is merely to delay legislation until it is quite certain that the nation approves of it, he would take a totally different view of its proper constitution from that which he would take if it were to have an absolute right of veto on Bills passed by the popular House

But, assuming that, for practical purposes, the question of a Second Chamber is discussed in relation to less powerful, i e less ancient, Second Chambers than the House of Lords, the alternative methods of their recruitment may be reduced to two or three Heredity may, for Western States (including the New World) be ruled out of account, with a possible saving for vested interests. One method, adopted in several modern Constitutions, is nomination, formally

[1] This was, it is believed, the reason for the want of success of the Conference on the Reform of the Second Chamber set up by the Prime Minister of Great Britain in 1917, under the distinguished Chairmanship of the late Lord Bryce If the Chairman asked a member whether he (the member) was in favour of the House of Lords having certain powers, the member would reply "Before answering that I would like to know how the House is going to be constituted" If, on the other hand, the member was asked whether he was in favour of the House being constituted in a certain way, he would reply · "I would first like to know what powers it is going to have"

by the President or other official Head of the State, really by the Leader of the majority in the First Chamber, the directly elected representative of the nation. This method is open to the very serious objection that, if the Leader of the representative House has been in office for a considerable time, his successor will find himself faced by a Second Chamber the majority of whom are opposed to him (the successor) in politics, and therefore, predisposed to take an unfavourable view of Bills coming from a House which, *ex hypothesi*, represents a change in political views from those of its predecessor. At least that will be so if the First Chamber is organized on Party lines and the new Leader owes his position to a change of views, either in it or its electors. If the new Minister is only the leader of one of several groups which are alternatively favoured by the majority in the representative House, the objection will not be so great; though it will, perhaps, be difficult for him to get his policy properly put before the Second Chamber. The English device, which is used to coerce a recalcitrant House of Lords by threatening to "swamp" it by the creation of new Peers, pledged to vote for the threatened measure, is, in modern Constitutions, usually ruled out by the fact, that the number of members of the Second Chamber is fixed by the Constitution, and cannot be increased by the new Government without fresh legislation, which, *ex hypothesi*, would be opposed by it. Alternative provisions are, that, in the event of a persistent refusal by the Second Chamber to pass a measure sent up by the representative House, the two Houses shall sit together in joint session, in which case the usually smaller number of the Second Chamber will result in a defeat for the latter;[1] or that a dissolution of Parliament shall automatically take place, and that, if the existing Government is returned with a majority in the representative House, the

[1] Of course this is not by any means necessary If the minority in the representative House is large, the addition of the members of the Second Chamber might enable it to defeat the Bill.

Second Chamber's assent shall no longer be required ; or, finally, that a direct Referendum to the electors, followed by a majority (more or less decided) for the opposed measure, shall be conclusive

Considerations such as these, together with a general preference for representative institutions, have in several instances created a Second Chamber elected by more or less popular constituencies. The most conspicuous examples are, perhaps, the Senates of the United States and the French Republic. With regard to the first of these, it was, probably, the deliberate intention of the Constituent Congress of 1777 that a powerful check should be placed, both on the large powers granted by the Constitution to the President, and on the democratic tendencies of the House of Representatives Moreover, there was the then highly important question of State jealousies, i e the unwillingness of the previously independent colonies (i e independent of one another) to merge their interests in a new and wholly untried body. Thus, whereas the constituencies for the House of Representatives are, roughly speaking, based on population, those for the Senate are arranged on a basis of rigid equality of each constituent State, whatever its population. It must, further, be remembered, as has before been pointed out(p 84), that the Fathers of the American Constitution had no intention whatever of introducing the Parliamentary Executive into it , and, therefore, they did not contemplate the causes of friction which naturally arise between the two Houses when such an Executive arise If to these sources of influence be added the great purely administrative powers of the Senate of the United States in the matter of controlling the patronage nominally exercised by the President,[1] and the necessity for its consent in treaties with foreign Powers, it will be seen that the Senate of the United States is an immensely strong body. such as no democratic country

[1] e g in the matter of appointing ambassadors, consuls, and Supreme Court Judges, the President requires the approval of the Senate

would dream of creating at the present day. It is, in fact, regarded by Mr. Lees Smith, in the work above alluded to (p. 112), as without "suggestions of value" for England, or, presumably, any other modern democratic Constitution. This is, perhaps, rather cavalier treatment; but it may be freely admitted, that the fact that the United States of America are a federal, not, like Great Britain, a unitary State, does draw a sharp line between the two countries.

No such objection can be raised to a reference to the French Senate. France, like Great Britain, is a unitary State, distinctly democratic, and with features strongly resembling those of many modern European States, whose Constitutions have, in fact, been largely modelled on hers. The French Constitution, however, is based upon the assumption that there is but one Party in France, the Party of the Republic, with the consequence, human nature being what it is, that there are "groups," constantly shifting, which make it impossible to treat them as permanent features of the Constitution, or to assume that there will always be a definite Government Party and one or two definite Opposition Parties, as in Great Britain. Consequently, when, in 1875, the Senate was constituted, it was decided (Mr. Lees Smith thinks under royalist influence)[1] to place the election of the Senate in the hands of the local government electors, i.e. deputies from the communes (one of the oldest institutions in France), and members of the Councils of Departments and Arrondissements, the last a body of little importance, between the commune and the Department. Moreover, the Senators, who must be forty years of age, are elected for nine years; retiring by thirds. A peculiar and special feature of the Senate's power is, that its consent is required for the dissolution of the First Chamber, otherwise than by effluxion of time; while its great financial powers,[2] as well as its unlimited right to

[1] *Op cit*, pp. 144-6

[2] The Senate may not originate but may amend financial legislation

refuse to pass general legislation, and its claim, rarely exercised, to cause the fall of a Ministry,[1] make it a formidable rival of a popularly elected House.

But representative, even directly representative, Second Chambers, which the French Senate is not, are to be found in modern Constitutions Of the six States of Australia, four[2] have elective Councils or Second Chambers, one[3] has no Second Chamber, and in one, the oldest of all,[4] the Council is elected (the members holding their seats for twelve years) by a joint sitting of the two Houses In the case of direct elections, the franchise is comparatively restricted, as compared with that for the First Chamber, being usually dependent on the ownership of property Thus the apparent anomaly of electing two Houses by the same process and under the same conditions for the same area is avoided In the Dominion of Canada, the Second Chamber is still nominated, but only from among persons of substantial wealth. Among the Provinces, only Quebec has a bi-cameral legislature ; and in it the Second Chamber is composed of nominees for life In New Zealand, a "unitary" Dominion, the Second Chamber is nominee, but only for seven years ; in the Union of South Africa, the Union Government has a Second Chamber, of which four-fifths are elective, with a substantial property qualification and an equal number for each Province The Provincial legislatures are uni-cameral [5]

The chief objection, from the point of view of those who desire to restrict the powers of Second Chambers, to an elective House is, that the Chambers, being representative, though only of restricted electorates, are inclined to insist more upon their powers than non-elective bodies The

[1] The Constitution (Art 6) seems clear "The Ministers shall be responsible to the Chambers"

[2] Victoria, South Australia, Western Australia, and Tasmania

[3] Queensland since 1922

[4] New South Wales

[5] It has been before pointed out (p 80*n*) that the Union can hardly rank as a federation.

taunts of "hereditary wisdom" and favouritism which can be hurled against non-elective bodies have no terrors for them; and they are inclined to retort with accusations of mob violence and plundering. The true answer to the taunts in question is: that, at any rate in modern Constitutions, the powers of legislative bodies are very carefully discussed before being incorporated into law, and the time for objections to be made to them is in the discussion in the Constituent Assembly or Convention which nearly always precedes the adoption of a new Constitution.

A SCANDINAVIAN EXPERIMENT

In conclusion, attention may be drawn to what is, apparently, one of the most curious, and yet one of the most successful of Second Chambers, which has now been in existence for over a century This is the *Lagsthing*, the Second Chamber of the *Storthing* or Parliament of Norway. All the elections to the *Storthing* are, apparently, on a uniform basis; but the first act of the *Storthing*, after its election, which is only for three years, is to elect from its own members, the *Lagsthing*, or Second Chamber, comprising one-fourth in number of the full *Storthing* This *Lagsthing* only acts when ordinary legislation is under discussion, and, even then, it has no initiative, and can only twice reject a Bill which comes to it from the *Odelsthing*, i.e. the remaining three-quarters of the *Storthing*. A final difference of opinion is settled by a vote, without discussion, in the full *Storthing* The *Lagsthing* has no financial powers. By this elaborate arrangement, the *Lagsthing* is, apparently, immune from all the criticisms which are usually levelled against a Second Chamber It is elected on the same franchise as the other House; and is, in fact, chosen by it from its members. It is so small, that, in a vote in the full Parliament, it can hardly succeed unless a large minority of the *Odelsthing* is of its way of thinking. Finally, though the principle of the Parliamentary Execu-

tive has now been in force in Norway for half a century, it has no part in the very drastic proceedings which the *Odelsthing* has power to take in order to control the Executive Apparently its sole and, apparently, useful power is to compel re-consideration, for a limited time, of general legislation It has no power to embarrass the Government in its daily tasks.

CHAPTER VIII

Departments of State
(b) Judiciary and Administrative

THE third of the great groups of functions which the modern State is called upon to perform is the judiciary group.

The existence of such a group, however feeble, is a somewhat striking admission of the possibility of error in the action of the other departments of the State, all the more striking that it is largely unconscious. For the root idea of the judiciary branch of the State's activities is, that, when these other departments have done their work, there still remains a possibility that there may be a need for the exercise of some special, perhaps higher function, which is essential, if confidence in the action of the State is to be maintained. If the Executive branch could be trusted to fulfil completely its primary tasks of the maintenance of order and security, if the Legislature acted always with perfect wisdom and legality, if the Administration were always prudent and law-abiding, it would be difficult to justify the existence of an elaborate system of Courts and Judges, and an intricate system of legal procedure What is the missing element in the primary conception of the State?

Surely it is the element of *impartiality.* In one sense of the words it is, of course, wholly untrue to say, that "all men are equal." They are not equal either in skill, in strength, in perseverance, or in honesty; and the modern popularity of the equalitarian idea is a popularity of comparatively recent growth But the view that, just

because a man is cleverer, or stronger, or richer than his neighbours, he should get his own way at their expense, has been repugnant to the conscience of mankind at least since the dawn of what is commonly called civilization. And it is to prevent this undesirable state of things that the administration of justice has been undertaken by the State

It is also worthy of notice, that, historically speaking, the administration of justice was not an original function of the State, at least in the Western World Long before the conception of the State was realized in practice by the feudal monarchies which grew up after the downfall of the Roman Empire, there had been in existencé local and communal tribunals for the shire, the *gau*, the *centaine* (or canton), the hundred, and the township Every community, secular or religious, felt the need for some such body The primitive and undifferentiated character of most of these tribunals is, in truth, a testimony to the universality of this aspiration for impartiality in all the interests of social life, not merely, as is often superficially assumed, in the maintenance of peace and order (" staying the feud "), though that, doubtless, came to be one of the most important functions of these tribunals It was rather that, in all the affairs of communal life, each individual should " get a square deal," that no man should be deprived of his ancient rights, established in the communal tradition, by force, fraud, or chicane—for this that these primitive " moots " (as the English called them) were held on the customary days. If this view be correct, this primitive feeling, which we have ventured to call " impartiality," was the oldest form of that august principle, so hard to define, which is now known as Justice.

Unfortunately, these primitive tribunals suffered, amongst other things, from one serious defect Though furnished with certain officials, notably the " beadle " who carried out the orders of the elders, and the " watchman," who afterwards borrowed a title from his betters and became the " constable," the force at the disposal of these

tribunals was insufficient to ensure that their orders were carried out. Moreover, they clung to the ancient methods of trial—ordeals and oath-helpers—which, with increasing knowledge, were becoming suspected. So there was a great opportunity for the incipient State, which, until the appearance of Parliaments, consisted, to all intents and purposes, solely of the Executive, to step in and take over the functions of these primitive tribunals. By the superior force at its disposal, the State was able to compel obedience to the decrees of justice. By the superiority of its procedure (notably by the introduction of its jury system), by the greater dignity and learning of the King's Judges as compared with the rambling discourses of the moots in which "the suitors were the judges," the State, after a sharp struggle, wrested from the ancient moots the administration of justice.

THE STATE'S COURTS OF JUSTICE

The exact procedure by which this momentous change was effected in England and the other European countries, though full of interest for the lawyer, is too technical to interest the layman. Moreover, there were differences between the various systems in the extent to which it was accomplished. Broadly speaking, the monarchs of the various feudal kingdoms, had, as has been before mentioned (pp. 30, 31), borrowed from the Empire of Charles the Great the practice, said ultimately to have been derived from the Eastern (Roman) Empire, of sending round their domains, on regular circuits or journeys, *missi*, or messengers, mainly with the object of ferreting out the various *regalia*, or royal dues, which, by the traditions of feudalism, were rendered by their vassals on various occasions, such as escheats, wardships, rarities of produce like precious stones and exceptional yields from fisheries. These items, together with the normal issues from Crown lands, formed the bulk of the royal revenues; and it was to these

that protesting taxpayers alluded, when they demanded that "the King should live of his own"

In England this process, owing to the exceptional strength of the Anglo-Norman monarchy, was carried out with a thoroughness rarely found elsewhere. Quite naturally, it often provoked disputes as to the legality of royal claims; and these, it may be suspected, were at first usually decided, somewhat arbitrarily, in favour of the Crown. Nevertheless, as the feeling for order and method grew, they ultimately assumed something that could be recognized as really judicial methods, i e at least a pretence of impartial investigation based on something which could fairly be described as evidence As early as the twelfth century, in fact, some of these royal *missi*, or messengers, were known as "Justices"

Then, by a momentous development, some matters which were not really royal claims at all, began to be brought before the royal *missi* on their circuits. These were, in fact, disputes between private individuals, though we should now speak of some of them as allegations of criminal offences, others were true private disputes, in which rival claims to property, or allegations of non-criminal injuries, were concerned

THE ASSIZES

To be exact, in the second half of the twelfth century, King Henry II took a bold step. In the year 1166, he issued, under the Ordinance-power claimed by the pre-Parliamentary monarchy (pp. 97, 98), a document known as the Assize of Clarendon, by which he ordered his Justices to meet periodically in each county an assembly of twelve of the more substantial men of each hundred and four from each township, to receive from them a report on oath of all reputed robbers, murderers, and thieves, or harbourers of such persons, since his accession. Ten years later, by the Assize of Northampton, the King added to the

list of offenders, false coiners and fire-raisers. The accused were to be made to undergo the "ordeal of water,"[1] and, if they failed at the ordeal, to lose foot and hand; they themselves to be banished and their chattels forfeited to the King. The older alternative, known as the "appeal of felony," by which the injured party or his representative challenged the accused to battle in such grave cases, was not formally abolished;[2] but, in fact, it was given its death-blow. And thus, what had been a private quarrel between the parties became definitely a "crime" in the modern sense—i.e. an offence "against the peace of Our Sovereign Lord the King, His Crown and His Dignity"; and the accusing jury, subsequently known as the "Grand Jury," remained a conspicuous feature of English criminal law till a few years ago, when it, in its turn, was substantially abolished. The somewhat crude method of trial by ordeal sanctioned by the Assizes of Clarendon and Northampton practically became impossible after the Lateran Council of 1216 had forbidden the clergy to take part in ordeals; and the Judges, after the accusation by the Grand Jury, apparently got into the habit of asking the accused to submit to a further inquiry by a Petty Jury of twelve collected in Court.[3] And thus the familiar model of a criminal trial for a serious offence assumed its modern shape, viz an "indictment" or accusation on behalf of

[1] There were various forms of the water ordeal That alluded to by the Ordinance was, probably, the plunging of an arm into boiling water. The arm was then bound up, and the bandages removed after a certain period If the arm appeared to be uninjured, the accused was deemed not guilty.

[2] After having been almost forgotten for centuries, the "appeal of felony" was revived in dramatic form in 1818, in the case of *Rex v Thornton*. Shortly after this it was abolished by Act of Parliament

[3] A striking illustration of the conservatism of old Law is to be found in the (to us) amazing fact, that, until the nineteenth century, an accused person could not be compelled to "put himself on the country" i e submit to a trial by the Petty Jury But the royal officers could make things unpleasant for him by applying the *peine forte et dure*, apparently the only form of torture sanctioned by the common law, to make him submit his case to the Petty Jury.

the Crown, presented (until its abolition) by the Grand Jury, and tried by a Petty Jury, which it retains to the present day [1] Minor forms of crime, known as "misdemeanours," were not triable by the King's Court until a good deal later, after the creation of the local Justices of the Peace, commonly known as "magistrates," who do not rank with the King's Judges of the High Court.

CIVIL CASES

But the final triumph of the judiciary in the pre-Parliament epoch did not come until they had got into their hands the trial of civil cases, i.e disputes which were genuine private lawsuits between private persons At the beginning of the twelfth century, there was no suggestion, in England at any rate, that these were matters for the State. There were feudal courts in which landowners settled the disputes of their tenants about their holdings, courts merchant which disposed of the legal business arising out of fairs, a good many borough courts created by charter or custom for the trial of cases between burgesses, above all the courts of the shire and hundred, the normal tribunals for small business, and the ecclesiastical courts for the affairs of churchmen But the King's Courts had two powerful weapons in their armoury—the writ of summons and the privilege of trial by jury The writ of summons was a personal order from the King, bidding the person summoned to attend before "Our Justices at Westminster," [2] to answer a complaint summarized in the

[1] One important result of the practical taking over of the functions of the "appeal of felony" by the King's Court apparently was the adoption of the capital punishment of hanging in the place of the somewhat milder punishments of the Assizes of Clarendon and Northampton This fact appears to have escaped the attention of legal historians Until the end of the eighteenth century, all felonies were capital offences by English law, unless specially excepted by statute

[2] Somewhat later, the writs of countrymen were made returnable at Westminster "unless before" (the date fixed) "Our Justices shall visit your county" Hence the modern "Nisi Prius" Circuit Courts

writ on behalf of a person named. The forms of these writs were carefully fixed by the Judges, who were thus able, in effect, to create a list of civil offences recognized by the King's Courts; and the Register of Writs which had passed the judicial scrutiny became the best authority on the English Civil Law. Gradually, though never quite completely, these offences were made triable by jury, a body which the King's order alone could summon. Thus, partly by sheer pressure, partly by bribery and, in some cases by rather doubtful devices,[1] the bulk of the more serious civil cases was gathered into the King's Courts at least have a century before Parliament came into existence; and the King's Judges were assured of that strong position which they have ever since retained.

THE COMMON LAW

Once more, at the risk of being technical, mention must be made of another element in English legal history which has enormously increased the power of the Judges. The English common law, the "universal custom of the realm," has never been codified as a whole, though certain important fragments of it have been re-enacted,[2] and large additions have been made to it, by Acts of Parliament. On the other hand, the doctrine of judicial precedent, accepted in England now for some four centuries, lays it down, that the judgment of one of the King's Courts, necessary for the decision of the case in which it was delivered, must be accepted as good law in any subsequent case involving similar circumstances, by any Judge of equal or inferior jurisdiction; unless in the meantime the law has been overruled by the decision of higher Court or altered by a

[1] One of the most arbitrary was the addition of the (wholly untrue) words "because the lord of that fee (estate) has renounced his jurisdiction in the affair" (*Quia dominus istius feodi inde remisit curiam*) The Barons in the Great Charter actually secured a provision abolishing this clause But in vain

[2] e g the Sale of Goods Act, 1893, and the Partnership Act of 1890.

subsequent Act of Parliament, which can, of course, override any previous judicial decision by virtue of the sovereignty of Parliament [1] Thus, perhaps even more than by its formulating power in the matter of writs of summons (pp 125, 126), the English judiciary has attained an importance far greater than that of other countries which have built up their legal systems largely on the tradition of Roman Law, with its code-like text ; for Roman Law has had but slight influence on the growth of English Law.

THE ACT OF SETTLEMENT

But, of course, the event which gave the final security to the position of the English Courts, and raised them to a position of security and dignity enjoyed, perhaps, by no other judicial body in Western Europe, was the passing of the Act of Settlement in the year 1700, a statute which was, in effect, a solemn compact between Monarchy and Parliament This statute enacts in its third clause that, after the Act has taken effect, " Judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established , but upon the Address of both Houses of Parliament it may be lawful to remove them " This famous clause is interpreted to mean, that nothing short of a formal Address from Lords and Commons, in Parliament assembled, can remove from office or diminish the salary of a Judge of a " superior " Court ;[2] and Speakers of the House of Commons have ruled that even casual criticism of a Judge, as distinct from a formal motion for an

[1] As is well known, the great English law reformer of the beginning of the nineteenth century, Jeremy Bentham, was a vivacious critic of "Judge-made law" But the rule of judicial precedent has serenely survived his attacks

[2] A " Superior " Court, in English practice, is a Court having unlimited jurisdiction within the realm, in respect both of subject matter and place The safeguard of *quam diu* tenure has been extended by more recent statutes to County Court judges, though they exercise only limited jurisdiction

Address will be "out of order." The effect of the Act has been, practically, to make the superior Judges irremovable by the Executive.

The famous clause of the Act of Settlement is of interest, not only because of its effect in England, but because it deals with a problem which arises in all States which have developed on Western lines. We have seen that, historically speaking, the States of Western Europe developed judiciary departments out of the practice of sending *missi*, or royal messengers, round the territories of their royal masters, to enforce the King's rights. Inevitably, they had been appointed to their offices by the King himself, at that time regarded as the sole depositary of the Executive power; and the practice survived, almost universally in Western Europe, the transformation of the *missi* into the later "Justices." Moreover, in accordance with almost universal tradition, they long continued to be appointed only "at the King's pleasure." Consequently, if, in the exercise of their offices, the Judges incurred the King's displeasure, they were, or could be, dismissed by him. In a country like England, where the sense of legality was strong, and where dismissals, or threats of dismissals, had followed, or threatened to follow, a display of independence by the Court in which a case involving political questions occurred, public feeling was strongly aroused. This was, as all students of English history know, precisely what happened in the earlier days of the seventeenth century, when upright and independent Judges like Sir Edward Coke were dismissed, or jockeyed into less lucrative positions, so that room might be found for men of a more servile type in cases involving Ship-Money and other political questions in which the King was interested. So far as England was concerned, the evil was cured by the clause of the Act of Settlement previously described (pp 127-8). But many other countries have dealt with the question less drastically; and there the problem of the independence of the Judge, who is not only appointed by

the Executive, but whose chances of promotion[1] are also dependent on the good will of the Executive, seriously diminishes the independence of all but the most courageous members of the judiciary. In England, it should be added, there is an additional reason for judicial independence in the fact that, by long-established tradition (only partly supported by express law), the Judges, even of the "inferior" Courts, are chosen from the ranks of practitioners in middle life of established reputation as advocates, whose professional traditions are strongly opposed to dependence on the State, instead of from young men at the beginning of their careers, who serve an apprenticeship in their judicial work, and thereafter rise by recognized stages to actual judicial posts In other words, in England there is no judicial profession; in many countries there is. In France, for example, in spite of her long traditions of freedom, it is not too much to say that her judiciary is less powerful to deal with acts of the Executive[2] than are their English colleagues; though this is not to deny that the citizen of France is, as we shall see later, perhaps more adequately guarded against oppression by the Executive than the British subject, albeit by other means [3]

DRAMATIC TRIALS

Before we leave the judiciary department of the State, it is necessary to refer to a striking novelty in the function-

[1] One of the peculiarities of the English judicial system is that promotions seldom occur in it, while in countries where the Judges rank as ordinary officials, the subject of promotion, must, naturally, be constantly impressed on the mind of the Judge

[2] There is, apparently, in France, a somewhat subtle distinction between "*actes de gestion*" which are justiciable in the ordinary Courts, and "*actes d'autorité*," which are not See the matter discussed in the classical *Traité Élémentaire de Droit Administratif* of H Berthélemy, the eminent dean of The Faculty of Law in the University of Paris (twelfth edition), pp 99-100 Paris Librairie Rousseau, 1930

[3] For an excellent comparison of Courts and Judges in modern France, Germany, and England, see an attractive little work by R C K Ensor, with that title (Oxford University Press, 1933) Especially Chapter IV.

ing Courts of Justice which has been manifested in some so-called "totalitarian States." This may be, perhaps, described, without offence, as their dramatic function.

From very early times, both in England and elsewhere, a Court of Justice has been deliberately staged to produce an effect upon the public. The ceremonial robes of the Judges, especially in the trial of criminal cases, the solemn procession to St. Paul's or Westminster, in the Sheriff's gaudy carriage at the "Assizes," the assumption of the "black cap" after a conviction for murder, even the wigs, coifs, and gowns of the advocates, are unquestionably intended to convey to the audience a sense of the majesty of the State. Indeed the very wholesome rule, long established in England, and now almost universal in Europe, that the halls of justice function openly and not in secret, was, probably, in the days before the press had made publicity easy, originally intended to strike the imagination of the country-side. But the new development above alluded to goes much further, by attempting to convince its audience, not of the innocence or guilt of the accused (that seems to be an almost irrelevant matter), but of a particular thesis, true or false, which for some reason, the State is anxious to prove to the community. It is, in such cases, not really the formally accused persons who are on their trial, but the sceptical audience, which, by way of the press and the radio, may be watching the so-called trial from afar. The dangers of such a course are manifest. If a thesis *must* be proved, then every means necessary to "prove" it, i.e. to convince the public of its truth, must be relentlessly applied. Unfortunately, there is a very old tradition in the tribunals of too many countries, perhaps in its origin, ecclesiastical, that a confession by an accused person is the best possible evidence of his guilt. Even if this tradition were based on the assumption that such a confession is entirely voluntary, it is, probably, psychologically unsound Unhappily, also, that is an entirely unfounded assumption; and it is one of the glories of the

English Courts that, even in criminal cases, this tradition of the superiority of a confession has long been abandoned, and "confessions," though not definitely excluded as evidence of guilt, are discouraged. For their great danger is that, though claimed as voluntary, they may have been produced by one or more of the many forms of torture which the devilish ingenuity of certain types of mind has invented Every inquisitorial tribunal is liable to this temptation ; for a tribunal which starts with the assumption that the accused is probably guilty, is apt to look upon an acquittal as a proof of its own defeat The only safeguard is for the tribunal to regard accuser and accused as on an absolutely equal level, and to place upon the accuser, as the initiator of the prosecution, the burden of proof. It is this safeguard, now familiar in English Courts of Justice for centuries, both in civil and criminal cases, which, perhaps more than anything else, has given those Courts their unrivalled reputation for impartiality and independence, which are the essential elements of Justice.

ADMINISTRATION

We come, lastly, to the fourth department of State activity, that known as Administration. It is the youngest of the branches of State activity in Western Europe ; and, in some countries, its independent existence is even denied, it being regarded as merely a form of Executive action. This attitude is probably due to the fact that, historically speaking, it owes its origin to the desire of the Crown, the Head of the Executive. to develop to their full extent the resources of the vast estates which, as distinct from the territories which they ruled, the monarchs regarded as their own "domains" The distinction between Crown domains and Crown territory was familiar to mediæval politics ; and it was to the former that the protesting taxpayer was referring, when he put forth his plea, that the King should "live of his own" (pp 99, 100).

For the essence of Administration, as distinct from the Executive, is that it consists mainly of the discretionary management and development of resources, material or moral, with a view to producing the best possible results. These resources may have various origins—legislation, inheritance, taxation, or benefaction; and, as has been said, the first conspicuous example of them, so far as the State is concerned, is to be found in the Crown domains. Afterwards, when it became clear that the King, for reasons previously given (p. 37), could no longer "live of his own," but regularly required the ever-increasing support of taxation *i.e.* a fund drawn from the private resources of the nation, it seemed natural, on the one hand, that the King, who was responsible for the proper use of the taxes granted by Parliament, should at least exercise the *de facto* control over their collection and expenditure, while, on the other, Parliament, which actually granted the taxes, should be entitled to be satisfied that the sums granted were expended for the purposes for which they had been demanded. This claim to what may be called, in modern language, an "audit," was, in England no less than other countries, stoutly resisted for centuries by the Crown. Even so easy-going a monarch as Charles II resented that "a set of fellows should examine his accounts." But the English Parliament, with good reason, was insistent. At length, perhaps owing to the advent of a foreign dynasty in the early eighteenth century, perhaps owing to the increasing activity of Parliament in Executive matters which followed on the adoption of the Cabinet System (pp. 85-9), the notion grew, that the mediæval distinction between Crown domain and national resources was out of date. Thereupon was established the system which has continued ever since, viz that all the King's income from public sources shall be regarded as part of the national revenue; while the King shall be assured by Act of Parliament at his accession, of a fixed annual allowance, which he may, in effect, spend as he pleases, Parliament under-

taking to provide for all the truly national expenditure The idea was not entirely repugnant to the first two Hanoverian monarchs, who were but tepidly interested in English affairs, but greatly disliked the notion that their private expenditure should be made the subject of criticism in Parliament; and, after being informally tried during their reigns, the system was definitely made official at the accession of George III, and its details worked out by the genius of Edmund Burke[1] as the "Civil List"

Another early appearance of what we should now class as an administrative office, was that of the transport of letters and dispatches There is evidence that, from very early times, kings and emperors organized such services, mainly, no doubt, in order to secure foreign news; and some devices were adopted for the purpose which to modern eyes appear strange For example, the Counts of Thurn and Taxis held the office of Postmaster to the Holy Roman Empire as a fief; while contracts with private individuals for the carriage of letters were familiar in England till well on into the seventeenth century. Gradually, however, it became clear, with increasing intercourse in international and internal affairs, that the State must undertake a national system; and, naturally, in the circumstances, the Post Office became a matter for the Executive, until the increasing demands of general public for postal and analogous service became so overwhelming, that the executive character of their origin was forgotten, and the Post Office came to be looked on as a great business undertaking, which, like other business undertakings, could be made a source of pecuniary profit—a characteristic wholly foreign to the older and more truly executive offices concerned with defence, diplomacy, and police

[1] It is evident that the scope of Administration, as one of the departments of State, is not yet fixed M Berthélemy, departing from the tradition of some of his distinguished predecessors in his classical work *Traité Élémentaire de Droit Administratif* (twelfth edition Paris Rousseau), includes in it the "judicial authority" (p 13) No English writer could accept this view for England.

Another event of European history which took place in the sixteenth century added a new impulse to the establishment of administrative offices by the State, and the adoption of methods distinct from those of the purely executive type. This was the great outburst of discovery of non-European countries by sea. Ever since the colonization of Europe from the East, some four thousand years ago, there had been contacts between East and West, mostly carried on as the result of hostile invasions from one side or the other, or by long and tedious overland journeys on trade routes. But the discoveries of the sixteenth century, especially the almost accidental discovery of America by Columbus in 1492,[1] enormously stimulated oversea contacts, and, unfortunately, also cupidity and the desire for overseas possessions by European States. As is well known, much of the European warfare of the seventeenth and eighteenth centuries really arose out of the rivalries of England, France, Spain, and Portugal for the domination of the Pacific and its assumed treasures; and the "overseas empires" of the rival States naturally produced yet another typical administrative office in their Constitutions, which, though it undoubtedly had for long a marked military aspect, inevitably became, in more or less degree, a business enterprise for the development of colonies for the benefit of the conquering or colonizing European States. Spain, one of the greatest of the beneficiaries of the new movement, broadly speaking, administered her overseas possessions on feudal lines, France by her powerful bureaucracy of the pre-Revolutionary system, England and the Netherlands by systems more suited to their democratic institutions. After a sharp struggle, despite the ancient theory that foreign possessions were under the sway of the royal prerogative (i.e. the Executive), because

[1] As is well known, the accidental character of the discovery has left an abiding mark in the name of the "West Indies," which Columbus believed he was sighting. The "West Indies" are, of course, nowhere near ancient India.

they were assumed to have been conquered by the King's soldiers, the English Parliament, as early as the seventeenth century, acquired a substantial share of control by means of the Board of Trade and Plantations and the somewhat later Colonial Office ; while the House of Commons, despite the protests of the King's Ministers, insisted on discussing details of colonial administration. The taking over by the Crown in the middle of the nineteenth century of the vast empire of British India, which, for three centuries and a half, had been left to the administration of the East India Company, added yet another to the rapidly growing list of administrative offices at Whitehall, the "India office."

But it was, of course, the outburst of legislative activity consequent on the passing of the Reform Act of 1832 and the Municipal Reform Act of 1835, which produced in England the greatest and most important additions to the list of administrative offices First came the successive schemes for supervision by the central government of the new activities of the reformed boroughs and the reformed Poor Law authorities, which produced, first, the Poor Law Board and the Municipalities Committee of the Privy Council, later on the Local Government Board in 1870, and the Ministry of Health in 1919 Again, after the severe visitations of cholera in the middle years of the nineteenth century, the more strictly sanitary measures rendered urgent by that event were prescribed by a series of Public Health Acts, which were largely left to be enforced by local authorities But central control over these was maintained at first by a Board of Public Health, later by various other departments, till it, too, was absorbed by the Ministry of Health in 1919 The Board of Agriculture followed in 1889, the Board of Education in 1899 ; while the most modern of English administrative offices—the Ministries of Labour, Pensions, and Transport—did not appear till after the Great War.

One somewhat technical point in the constitution of these administrative bodies should perhaps be mentioned.

Until the end of the nineteenth century, presumably in deference to the democratic view that administration requires discussion, it was the fashion to create "Boards," rather than Ministries, to deal with it. We have already mentioned several of them. These Boards generally consisted of several very eminent persons, secular and ecclesiastical, such as Secretaries of State and Archbishops, who were far too busy to attend Board meetings, and, probably, were never expected to. As a matter of fact, meetings of these Boards were seldom, if ever, summoned; their actual work being done by a "President" or "Vice-President," who alone received a salary from the Board, and who was carefully made eligible for a seat in the House of Commons, so that Parliamentary control of his acts and defaults might be maintained. After some half-century of this solemn farce, the simpler expedient of creating an individual Minister to deal with each administrative office was adopted; and, with the exception of the Board of Trade and the Treasury,[1] the typical administrative office consists now of a simple Minister, with usually, under him a large staff of "permanent" officials (p. 30), who are not supposed to take any part in the policy of the office, for which the Minister is alone responsible to Parliament.

Thus, alongside the old Executive offices, there have, apparently in other countries of Western Europe as well as England, arisen far larger groups of Administrative offices. These offices, being mostly the creation of Acts of Parliament, can, of course, have no pretensions to exercise the Royal Prerogative, which still, however faintly, gilds the ancient Executive offices. Their acts can be set side by

[1] The Treasury, probably for long a purely Executive office (see p. 30), seems to have become definitely administrative at the beginning of the seventeenth century, when the ancient office of Lord High Treasurer was "put into commission," i.e. dissolved into a Board, a practice which has since been almost invariably followed. The first (named) Lord is the premier member of the Board, and, being also usually Prime Minister, is, in effect, the Head of both the Executive and the Administrative offices.

the Courts if they are *ultra vires* or illegal; their chiefs are amenable to the Prerogative writs[1] issued, in proper cases, by the Courts of Justice; and, being almost entirely statutory, their powers and duties are not difficult to ascertain They derive, very largely, from the great movement in favour of social reform which has been such a marked feature in the life of the nation during the last half-century, especially since the Great War, and which has been so largely due to the more intimate co-operation between Crown and Parliament, i e. the Executive and the Legislature, effected by the Cabinet System (pp. 85-9). If there is one word more than another which distinguishes administrative from executive offices (and the line is in some cases admittedly hard to draw) it is that the administrative official is, as has been said, supposed to exercise discretionary, rather than arbitrary powers, like those of the Executive, or strictly impartial powers, like those of the Judiciary He is, like the Executive and the Judiciary, bound by law, but bound by it to exercise discretion.

It is not immaterial to notice here one important recent development of State action which manifests itself mainly in connection with administrative affairs, and may lead to a definitely new form of State activity in the future. This is the practice of creating outside bodies which, though not officially State organs, are formed with the main object of carrying out the policy of the Administrative side of the State, by the tendering of expert advice to the Government, the pursuing of detailed inquiries, or even, to some extent, of exercising State authority.

[1] These, of which the Habeas Corpus, the Mandamus, and the Certiorari are the best known, are ancient writs issued at the instance of the Crown itself and directed against persons who are alleged to be neglecting their duties, usually, though not invariably, as servants of the public The Habeas Corpus requires the person to whom it is directed to produce an individual alleged to be in his custody before a Court of Justice, the Mandamus bids him perform some ministerial duty, the Certiorari calls up proceedings from an inferior to a superior tribunal, for alleged defect of justice

ROYAL COMMISSIONS AND OFFICIAL BOARDS

The old expedient of appointing a Royal Commission to inquire into a subject on which the Government contemplates legislation, may perhaps be ruled out of account, inasmuch as such a step merely contemplates a Report, fact-finding and advisory, which the Government may accept or reject as it thinks best. But other devices recently adopted have a more permanent character Perhaps one of the most important is to be found in the British Broadcasting Corporation, in which the Governors are appointed by the Crown for a definite period, with large powers of administration over a substantial revenue which is provided by the State out of the proceeds of wireless licences. The object is, no doubt, to secure at least the appearance of impartiality between the various interests likely to be affected ; but the fact that the Postmaster General represents the corporation in Parliament makes it practically a sub-department of State. Another method is the appointment of Crown representatives upon a directorate the majority of whose members are elected by shareholders or others whose interests are concerned, as in the case of the Port of London authority. Yet again there are the Boards which are entrusted with the carrying out of various schemes in an industry which, usually in return for substantial subsidies from the State, has been subjected to regulations in the public interest , examples being the various Marketing Boards for agriculture and fishing Sometimes a Commission, intended to be more or less permanent, is appointed by the Crown to expend a fund, placed at its disposal by Parliament, for a certain widely defined class of public objects ; such as the Development Commission and the British Museum. Sometimes a Commission receives no grant of State funds, but is given legal powers to co-ordinate certain otherwise independent

sources of supply of a material of great public importance in which unregulated competition is considered to be undesirable in the public interest. Instances are the Central Electricity Board and the London Passenger Transport Board. Again, where purely non-official societies whose activities require, in the public interest, to be watched and advised on the observance of the law, an official is appointed by the Crown to oversee them; a good example being the Registrar of Friendly Societies. Some standing Committees appointed by the Crown are purely advisory, such as the Imperial Shipping Committee, the Import Duties Advisory Committee, or the Unemployment Assistance Board; but it is understood that the Government will pay special attention to their recommendations Some of these bodies, such as the Medical Research Council, are actually incorporated by Royal Charter; others are merely appointed from time to time.

Such a tendency as has been illustrated, though needing care and watchfulness, seems to be entirely commendable, not only as bringing the State into contact with public opinion, but as drawing into the public service the valuable help of specialists mainly occupied with other affairs, and thereby linking together the two elements which, as has been before suggested, are the essentials of good government, viz authority and co-operation.

It is convenient, in concluding a chapter which has been primarily devoted to the Judiciary and the Administrative functions of the State, to allude to a discussion[1] which has recently arisen, and of which more is likely to be heard in the future, of the rival claims of these two branches of State activity to dispose of questions on the border line between them This may be described briefly as the question of

[1] Readers who are interested in this subject may be referred to two books which deal carefully with it from opposite points of view One is by Lord Hewart entitled *The New Despotism* Ernest Benn, 1929, and the other, entitled *Justice and Administrative Law*, by W A Robson. Macmillan, 1928

Administrative Tribunals. Put more exactly, the question arises as follows Suppose that, in the exercise of its discretion, an administrative department does an act which, though it is not a breach of the law, a private citizen considers to work injustice to his interests, to whom should he appeal for redress—to a Law Court or the Head of the administrative office concerned?

Now it must be admitted, that, at first sight, the case for the Administrative Tribunal as against the Law Court, at any rate under English conditions, is very weak. Let us consider the differences between the two tribunals:

1. The Law Court is presided over by a person or persons who is, or are, entirely unaffected, so far as reputation or personal interests are concerned, by the result of his or their decision. There is an old but sound maxim: *Nemo judex in suâ causâ*. Against this, the administrative tribunal clearly offends. Technically, at least, the Minister at the head of the department is judge and defendant in his own case; and though, doubtless, in any great administrative office, he has a large staff, from whom he can select for the tribunal persons whom he knows but slightly, yet those persons will necessarily be his subordinates, looking to him for their careers, and inclined to decide in accordance with what they believe to be his wishes. Moreover, he is answerable to Parliament for their acts and decisions; so that, whichever way the decision goes, he may be called upon to suffer, either for the original act if the appeal is successful, or for the decision if it fails. Moreover, in the considerable number of cases in which an administrative appeal turns on a question of fact, the Judge has, or may have, the advantage of the assistance of a jury who may fairly be said to represent public opinion, a by no means negligible element where a scheme—say a housing programme which affects a large number of the public—is in question.

2. By long tradition, a trial in Court is (with rare exceptions) held in public, by a Judge whose identity is unmistakable, in the presence of such of the public as may

choose to attend. The safeguard afforded by this tradition is overwhelming. Secrecy is the opportunity for favouritism, incapacity, and, above all, for the absence of that which is rightly described as of the essence of public satisfaction, viz that justice should not only be done, but should manifestly appear to be done. Even a disappointed litigant is often consoled by the fact that he has had an open trial of his case. He feels that, if anything irregular had occurred, there would have been a protest, and that, by the absence of any protest, he was condemned, not only by the Court, but by his fellow citizens. Unfortunately, according to present practice, in the administrative tribunal no such safeguard exists. The defeated suitor may not even know the names of his judge or judges The award is conveyed to him in the name of the Minister at the head of the department; but he has a justifiable suspicion that the person or persons who actually decided his fate may be officials of no great standing, who have arrived at their conclusions in haphazard fashion, by reason of preconceived general views, or even dislike for a troublesome litigant who has attempted to put a spoke into the wheel of administrative efficiency And he has no remedy. Any attempt to "individualize the department" is forbidden He feels that he is a victim of routine, that no one cares about him as an individual

3 By an equally long tradition of English Courts of Justice, the Judge who decides the case not only states his conclusions, but states openly in Court the chain of reasoning which has led him to arrive at them This is a most valuable tradition; for it compels the Judge to apply his mind keenly to the arguments for and against his conclusion, to support it by reference to enacted law and precedent, not only to the litigant, but the public, and especially that highly qualified section of the public which will probably be present, viz the members of the legal profession who listen keenly to his words, and, it may be, will criticize them afterwards in the professional organs of

opinion which no Judge can pretend to despise. The disciplinary effect of this practice on the Judge's own mind is a powerful influence towards a correct judgment. So clearly are these considerations recognized by the English Judges, that, not infrequently even if they have, at the close of the arguments, come to a definite conclusion on a case, and even announced it, they will hold a subsequent session at which their reasoning will be formally explained.

Not so with the administrative tribunal. Its conclusions are badly stated, and merely conveyed to the complainant in a formal letter, leaving him guessing at the defects in his case, and perhaps depriving him of valuable help for the regulation of his conduct in the future. As a result, he feels that he has not had a "fair show." Justice may have been done; but it has not manifestly appeared to be done

4. This leads naturally to what is, perhaps, the worst defect of administrative tribunals. In an ordinary trial in a court of Justice, the parties face each other in open Court, represented, if they please, by trained advocates who, if there is any doubt about the facts, have to prove each argument which they put forward by the evidence of sworn witnesses liable to prosecution for perjury if they give false testimony, and subjected to cross-examination by their opponents' advocate. Hard things are sometimes said of the delay and expense caused by the severity of the rules of English Law on the subject of evidence; and, doubtless, some of the more formal of its requirements might be, and are being, relaxed. But can anyone who knows (and who does not?) the way in which mere rumour, or suspicion, or prejudice, may produce a false impression of the truth doubt the wisdom or the essential value of the rules of evidence, especially of oral evidence, and its superiority over the mere official exchange of correspondence by which administrative decisions are, it is believed, not infrequently reached. It is sometimes urged in defence of administrative methods that there is no analogy between them and the ordinary *lis inter partes*. That is almost

equivalent to an assertion that a person who complains of the projected scheme of an administrative department is probably a troublesome fellow who is attempting, for his own selfish ends, to obstruct a beneficent scheme intended for the public good. It would be almost wiser, in that view, to refuse to allow objections at all.

5. It is sometimes urged, in defence of administrative tribunals, that there is little or no analogy between the questions which come before them and those submitted to Courts of Law It is said, for example, that an objection to the effect that the closing of a street or the order for demolition of a house which is made to carry into effect a slum clearance area, would work injustice, is a totally different kind of question from a question whether or not A has trespassed upon B's land, or the like, and that the skill of a Judge, it may be aided by a jury, is a totally different kind of skill from that needed to decide whether an objection to a clearing scheme is justifiable. That is doubtless true ; but it ignores the fact, that a Judge with general jurisdiction is often called upon to decide questions of far greater difficulty than those which arise, for example, in an ordinary action of trespass, and that, in such cases, however many complex and difficult details may be involved, he is not without resources in dealing with them. Let us suppose, for example, an action for the infringement of a patent or for negligence in complicated business transactions The Judge may himself be quite unacquainted with the scientific processes involved in the case when he commences to try it But it is part of a Judge's training to listen to explanations, by experts, of these processes, to elucidate these explanations by questions put to these experts, to hear criticisms of them by experts on the other side As has been before pointed out, the actual conclusions at which the Judge may arrive after hearing these explanations, do not affect either his interest or his plans, nor need they in the least affect his reputation. His one desire is to reach the truth , the consequences are not his

concern. If the success of the complainant should hold up a scheme which, by reason of the fact that it has been sanctioned by the Minister in charge, is *ex hypothesi* a good one, that is not a complete answer to the complaint. If the Act of Parliament which, it is alleged, authorizes such a scheme, has also authorized the lodging of complaints before a tribunal, presumably Parliament has foreseen that complaints may possibly be justified; and the question whether this is, in fact, the case in any particular instance, is exactly the kind of question which a Judge spends his days in considering. Putting it another way, because Parliament has authorized the preparation of schemes of slum clearance, it does not follow that it has authorized the particular scheme in question. And the question whether it would have done so had it known its details, is a question which is only determined by a study of the Act itself, and not by an interpretation, however authoritative, of the intentions of the Minister who introduced the Bill on which it is founded.

CHAPTER IX

"The Party"

IT would be an obvious omission in a work on political science to leave unnoticed an interesting development which has recently taken place in three important States in Europe, but for which at present no distinctive name has been found. It would even be possible to argue, that it forms no acknowledged part of State machinery, though it may profoundly affect the working of that machinery.

This development is generally alluded to as "The Party"; but the name is unfortunate, because it suggests misleading analogies with the older type of constitutional party which has, as we have seen (pp 91-3), played a great rôle in the evolution of democratic systems of government. One of the most striking differences between it and the older type is, that, instead of looking upon an increase of its numbers as a test of its success, "The Party" is a restricted group, usually recruited by co-optation, with a severe standard of merit which is tested by constant examination Historically speaking, it is usually the outcome of a more or less violent revolution; and its chief object is to defend the achievements of that revolution. Its individual members may or may not form part of the "permanent civil service" (pp 109-10) of the State; but if they do, their functions as members of the Party are distinct from their functions as executive or judicial officials [1] Another great difference between the Party (in the sense of the new development) and the constitutional parties of the older

[1] In the conspicuous example of Russia, all active workers are, in a sense, "officials" But there is also in practice a "bureaucracy."

type is, that it not only opposes (as do constitutional parties) its rivals, but, in effect, treats all other voluntary political associations as illegal, to be suppressed by force, if necessary. Finally, whereas, in the older Party systems, the very object of the system is to secure a thorough discussion of policy from different points of view, each critical of the other, in the new system, opposition to, or, even, criticism of, the policy of "The Party" is not allowed, at least in public.

RUSSIA

Mr. and Mrs. Sidney Webb, whose account of "The Party" in Soviet Russia is, perhaps, the most full and valuable picture in English of the working of the new development,[1] are inclined to compare "The Party" with the great Religious Orders of the medieval Christian Church. But, apart from the fact, before alluded to, of the absolute claim of monopoly in voluntary political association, in Russia the rigid exclusion from "The Party" of all members of the former privileged classes, however sound their professed ideals, is in marked contrast with the practice of the Catholic Orders, which were recruited freeely from all ranks of society, and contained many converted "heretics." It might, perhaps, be suggested, that a closer precedent is to be found in the *hus-carls*, *gesiths*, or personal body-guard of the early feudal monarch, whose function, as distinct from that of the regular feudal levy, was, in the last resort, to perish in defending him on the field of battle, and at other times, to act as his special champions and representatives. If this view is correct, "The Party" is a reversion to a still older type of organization even than the Catholic Orders.[2]

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[1] *Soviet Communism; A New Civilization* (Subscription Edition, 1935) Part I, Chapter V

[2] By way of supplement to the impartial and systematic study of Mr. and Mrs Sidney Webb, based largely on official documents, it is in-

GERMANY

It is a somewhat singular fact, that the existing German régime, in its professed objects the relentless opponent of the system of Soviet Russia, should also have found it desirable to arm itself with a monopolist " Party." Though much younger than the creation of Lenin, it fulfils a rôle analogous to that of its forerunner Naturally, as the economic system of Germany has not been communized, the methods and doctrines of the National Socialist German Workers Party differ profoundly from those of the Soviet " Party."[1] But the rôle which it plays in stimulating the energies of both capitalists and workmen, in demonstrating the importance of a united front to the outside world, and in holding " congresses " at Nuremberg and elsewhere with a view of impressing the might of Germany both on Germans and foreigners, closely resemble the corresponding congresses of "The Party" at Moscow so carefully described by Mr and Mrs. Webb [2] It is true that, so far as seems to be known, there is nothing in Germany which corresponds to the " soviet " or spontaneously evolved unit of soldiers and workmen upon which the formal constitution of the U S.S R is based On the other hand, it is a striking fact, that " The Party " in Russia is not organically connected with the soviet system , and so the resemblance to Russian conditions is clear Once more, the exclusion from " The

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structive to read the personal experiences during the same period of Andrew Smith (*I Was a Soviet Worker*, Robert Hale, 1937) Mr Smith, an active Communist for many years in the United States, went to Russia as an engineer in 1932, and spent three years there as a member of " The Party " in a State factory

[1] They will be found set out in the Appendix to the American translation by Pinson of Lichtenberger's *The Third Reich*, Duckworth, 1938 In this manifesto, which was drawn up in 1920, and confirmed in 1926, there is, however, no formal proscription of other parties A more recent and quasi-official statement of the aims of the " Party " will be found in a small volume entitled *Germany Speaks*, Thornton Butterworth, 1938

[2] *Soviet Communism*, pp 339-418

Party" in Russia of all persons professing, or having formerly professed, Christianity, is, probably, the chief reason for the intensely hostile attitude of the Roman Church towards communism.[1] Within the ranks of "The Party" itself, apparently, matters in dispute are, in theory, decided by a simple majority vote. But it is worthy of note, that this seemingly democratic rule has not prevented the emergence of individual despotism. Stalin and Hitler are, probably, the inevitable results of "The Party" as a system.

ITALY

The third prominent example of "The Party" in modern political systems is, of course, the Fascist Party in Italy. But the Fascisti differ somewhat strikingly from their analogues in Russia and Germany, in having, at least in theory, a constitutional origin. As is well known, modern "Italy," until the middle of the nineteenth century, was only a geographical expression, in spite of the fact that the peninsula, with its single land boundary, appears to be an almost ideal unit for a territorial State. Not only was the country divided into numerous City Republics—Florence, Siena, Venice, etc., but the rival claims of France and Austria had succeeded in establishing non-Italian governments of invaders in various parts of the peninsula, while the temporal claims of the Papacy maintained in existence a medieval body of "Papal States" whose existence was incompatible with modern principles of national Statehood.

In the middle of the nineteenth century, however, as is also well known, a strong movement of nationality began to ferment in Italy; and, by a series of picturesque struggles, generally known as the *Risorgimento*, the Italian-speaking elements of the peninsula gradually coalesced under the House of Savoy, whose headquarters were in

[1] Otherwise, it would appear to be strange that a Church which has practised, and still practises, communism on a larger scale than almost any other organization, should oppose communism as such.

Piedmont, on the Italian slopes of the Alps, but which had, by 1860, also established itself in Sardinia. The turning-point in the movement was the adhesion of Garibaldi to the then representative of that House, Victor Emmanuel, as a result of which the " Kingdom of Italy " was recognized by one European Power after another—Great Britain, Portugal, Belgium, Prussia, Russia ; though the seal was not set on the new National State, after the heroic guerilla warfare of Mazzini and Garibaldi, till the final entry of the Savoyard troops into Rome, in 1871.

But one of the reasons why the House of Savoy ultimately won the adherence of the various forces which brought about the *Risorgimento*, was the fact that, as rulers of Piedmont, they had published, in 1848, and loyally abided by, a liberal Constitution, or Statute, one of the oldest written Constitutions in Europe, which seemed to mark them off definitely from the absolutist monarchs who played such a disturbing part in the politics of the peninsula during the critical years 1860-70. And the celebrated " March on Rome " of 1922, though it afterwards figured as a spontaneous outburst of national feeling, was, it is now generally accepted, actually made on the invitation of King Victor Emmanuel III, the constitutional ruler of Italy, who saw in Mussolini a solution of the many difficulties caused by a succession of weak Ministries. Nor, despite the recurrence of certain violent incidents,[1] did Italy lose the sympathy of the democratic countries before her cynical aggression against Ethiopia, a Christian State whose admission to the League of Nations she had herself championed in 1935

One or two remarks of a general nature may be premitted ; before an attempt is made to assess the importance for the future in the politics of the world of the new development of " The Party " principle

[1] e g in the cases of Matteoti and Amendola, and the incidents of Corfu and Fiume.

FEATURES OF THE PARTY

In the first place, the development is, obviously, a challenge to the fundamental principles of representative government, viz. (1) that the ultimate control of the nation rests in the hands of a comparatively small body of persons chosen, after open discussion, by an electorate which comprises substantially the whole adult population of the country of which that State is the ruler; (2) that this comparatively small body of elected citizens must seek the renewal of the confidence of the electorate at comparatively short intervals. It is not, of course, pretended, that all the existing examples of representative government have adopted these principles in full. For obvious reasons, persons under conviction of crime against the laws of the State which they have, *ex hypothesi*, helped to create, must, to some extent at least, be excluded from the task of choosing their future rulers. Probably it is also logical that persons who owe, at least technically, allegiance to foreign State, should be excluded from electing representatives to the governing body of that State in whose territory they happen to reside. But it is now generally agreed, that franchise disqualifications based on religion or colour are unjustifiable. Even more unjustifiable, if possible, are disqualifications based on sex; though there is at least one prominent example of an otherwise distinguished representative system which still maintains them.

It is, indeed, reasonably clear, at least in most cases, that the "Party" system which we are now discussing cannot allow any genuinely representative institutions to play a practical part in the administration of affairs. "The Party" proclaims that its authority is "derived from above, not from below"—the latter alternative being, presumably, a reference to Ministers who derive their authority from a representative assembly. Perhaps as an unconscious, though somewhat illogical, tribute to the

deep hold which representative institutions still have on the popular mind, there is, even in autocratically governed countries, usually a formal, sometimes a very elaborate, artificially created representative body, as, for example, in Russia and Germany But its function is merely to accord approval, at long intervals, to the policy of " The Party," which alone is entitled to put forward a programme at the so-called elections In Italy, the Chamber of Deputies can only be elected, since the electoral law of 1928, from a list submitted to the electors by the Fascist Grand Council. In Turkey, in some respects the most enlightened of the dictatorships, the representative body has the valuable safeguard, that its tenure of office coincides with that of the Dictator-President; so that both are, in theory at least, out of office at the same time. Moreover, the Assembly must be elected first, for it is that body which elects the President [1] Still, it is understood, that the " People's Party," consisting of the President's personal followers, took care to see that the electors, at any general election, returned an Assembly pledged to vote for Mustapha Kemal as President.

A second point to notice about " The Party " is, that, despite the evils which, according to the dictatorship view, arise from divided authority, the brief history of dictators in post-war Europe has not been free from rivalries It is, indeed, difficult for a foreigner to be very sure about what actually happens in a country which lives under a rigid press censorship, and it would not be a matter of surprise to learn, some day, that many well-known figures, whose " liquidation " has been announced (obviously with the permission of the authorities) during the last two or three years in Russia, have survived the announcement of their deaths But enough has transpired to make it tolerably certain that the complete loyalty of " The Party " has not been consistently maintained during the

[1] Constitution of 1924, art 31.

period which has elapsed since the Russian Revolution of 1917; while, in the case of Germany, the announcement by the Leader himself of the details of the "purge" of 1934, seems to be conclusive as to its substantial truth.[1] Since 1924 or thereabouts, there have been no avowed rivals for the thrones of Mussolini or, until his death, of Mustapha Kemal; though there have from time to time been rumours that certain of their followers, who were attracting too much limelight, have been removed to less conspicuous positions.

This brings us, naturally, to a third and very important feature in the system of "The Party." When a Leader (who is, after all, mortal) dies, or is removed, what happens? It is one of the peculiar merits of a constitutional State, that the group of institutions of which it is composed, provide an answer to a similar question, in the succession of its monarchs or presidents. It is difficult, if not impossible, for a true dictatorship to do so without sanctioning an apparently endless succession of revolutions. The claim of the dictator is, as we have said, that he receives his power "from above, not from below." But what exactly does this mean? Presumably, a modern State is not likely to receive with meekness the nominee of any professedly ecclesiastical authority.[2] Hardly less unlikely is it, that it will allow any testamentary appointment by a deceased Leader to dispose of his coveted power. Any formal election by the holders of a nominal political franchise would invite immediate action by ambitious rivals to secure the key to the suffrages of the electors by seizing the Party machinery. It is, probably, far too late in the day for the influences that, in feudal times, converted

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[1] For a highly critical account of the incident which led up to the "purge," see the work *I Knew Hitler*, by Kurt G. W. Luedecke. Harrolds, 1938. A more impartial account will be found in *Hitler*, by Konrad Heiden. Constable, 1936.

[2] It is, perhaps, worth noting, that the Turkish Constitution of 1924 dropped its description of the Republic as an "Islamic State," in 1928.

the host-leaders of the invasions which broke up the Roman Empire into hereditary monarchs, to perform a similar service for their modern successors The chief reason for the appearance of feudalism in the Middle Ages was want of means of communication. There were no printed books, no effective press, very few roads, no railways, no telegrams, no radio, no aeroplanes It is difficult to think of Stalin, or Hitler, or Mussolini, or even Mustapha, without the last.

ARE DICTATORSHIPS EFFICIENT?

But, of course, the case against dictatorship does not rest on criticism of its difficulties and dangers. The real case for its rival, democracy, is, that the latter is so much more efficient than its rivals, even by the test which, avowedly, appeals most to the dictators themselves, viz. the test of war. After all, in the three great wars which have been fought in Europe during the last century and a half, viz those against Napoleon, Alexander of Russia, and the Central Powers, the autocrats have been decisively defeated by the democratic powers. But no sound democrat would care to appeal to such a limited test ; and, indeed, it is possible to argue, that some of the least wise policies of the democratic States have been planned on their emergence, victorious, from the test of war

It is worth while to dwell a little longer on this " efficiency " test ; because there can be small doubt that the dictators have been able to persuade, not only their own subjects, but also their admirers in other countries, of the efficiency of their systems That is a typical example of mental hypnosis, by which certain acts, in themselves merely startling, spectacular, or even positively harmful, are imposed upon these persons by making them resemble things which they, the persuaded, have learned, perhaps quite rightly, to value. The true test of efficiency is, in homely language, the getting done of things really worth

doing, with the least expenditure of human life, health, leisure, and wealth Judged by this standard, the democratic States, at any rate of the Western World, are unquestionably more efficient than the dictator States.

To begin with, as has been suggested, it sometimes appears to be almost necessary to remind the advocates of dictatorship that it was the democratic States and not the autocratic States which won, decisively and completely, the Great War of 1914-18; despite the fact that the dictators obviously regard war as the supreme test, and are always, more or less, on a war footing. If it be alleged that, but for Russia, the Allies would not have won, and that Russia was, from the first, an autocratically governed State, the answer is that, despite the bravery of her soldiers, Russia, after 1917, became more of a liability than an asset to the Allies, and that, in any event, the Allied and Associated Powers did win the War. If, again, it be urged, that the material resources of the Allies were superior to those of the Central Powers, the answer is, that that is a way which democratic communities have. They may be slow to move, though there are instances which suggest that this is not always the case For example, the muster and transport of the Expeditionary Force across the English Channel in August, 1914, was generously admitted, even by German experts, to have been one of the finest and most successful military movements on a great scale ever executed Again, the rapidity with which the United States raised and transported the American armies after it had joined the Allies, was little short of miraculous. The reason is, that, in the democracies, every citizen (with negligible exceptions) not only pulled his weight, but knew that he was pulling his weight, and felt that the issue lay as much in his hands as in anybody else's, that, in spite of the pathetic belief of the autocratic mind in the supreme virtue of authority, co-operation is a stronger force than blind obedience, and that nations, and even armies, are not chessmen on gigantic chess-boards, but living and

thinking men and women. All that is, of course, not to deny, that many mistakes were made by the democratic countries in the War, some of them very serious; but there is an old saying which probably sums up a good many centuries of experience, that, in any war, both sides make mistakes, but that the side which makes the fewer mistakes wins

Happily, however, strength for war, important as it is, is not the only important aspect of efficiency In spite of the undoubted achievements of dictators in the new science and art of mass psychology, it is too soon to believe that nations, especially virile nations, prefer blind obedience to willing co-operation Discipline is, doubtless, essential to the carrying on of social and industrial enterprises, in which large numbers of human beings are engaged in working for a common end. But it is only a comparatively late and historically unsound meaning attributed to "discipline," which equates it with mere mechanical response to authority. Historically speaking, a disciple is one who is engaged in learning; and learning, at any rate sound learning, is not a unilateral, but a bilateral, process, in which the minds of the teacher and the taught co-operate The function of the former is not merely to deposit masses of information in the memory of the latter; but to stimulate his mind to apprehend knowledge by its own effort, and try to put it to use. Even in matters military, whose main purposes are inhibitory, not productive, this truth has been grasped by the greatest of soldiers. It is more obvious when the objects of the association are not merely inhibitory but productive.

Finally, it may be remarked that, it is one of the most curious inconsistencies of a system which professes to aim at the creation of a class-less society, that it should have been the first to exhibit to the world the institution of "The Party" as an element in political organization Doubtless "The Party" in Soviet Russia is not a "class" determined by economic conditions But there appears to be little

reason to assume that the Marxian definition of "class," a word far older than Marx, is any truer as a test of the existence of the thing itself than any other test A "class" is a body of persons within a society, which is differentiated from society at large by the exercise of certain functions, or the suffering of certain disabilities, distinguishing it from other members of the society Whether the existence of "classes" in a national community is, in itself, a good thing or a bad thing, is a question too large for discussion in a work on political, as distinguished from social science, and on which much could be said on both sides But it is, probably, safe to say, that whatever arguments may be urged in favour of the existence of social "classes," has little application to a monopolist "Party" which, allowing no criticism outside its own ranks, and working largely in secret, almost inevitably becomes a kind of secret police, with all the dangers and temptations attendant upon the irresponsible exercise of unlimited power.

CHAPTER X[1]

Fascism and Democracy

IN the year 1916 there was published in London a small book entitled *Instincts of the Herd in Peace and War*,[2] which, despite the fact that it is not altogether "easy" reading, created a profound impression upon the public mind. The short proof of this statement is, that the book was reprinted seven times; the impressions occurring after the close of the War being grouped as a second edition. Its author signed himself on the title-page: "W. Trotter," without further description; and it has taken some little effort to identify him as a distinguished practising surgeon, who is too modest to describe himself as an "author" in the ordinary sources of information.

One of the remarkable features of the book was the almost uncanny way in which some of its most confident predictions were fulfilled within a few years following its publication; and this fact, doubtless, accounted for much of its popularity. But there may have been another cause, less apparent, for the interest which it evoked. For the Preface of the book reveals the fact, that its origin is to be found in a controversy of a kind somewhat rare in English annals, which, as many will remember, had agitated the intellectual world in the early years of the twentieth century. The controversy turned on the question: "Is there such a thing as Sociology, or the science of

[1] The substance of this chapter appeared as an article in the *Hibbert Journal* for January, 1939, and is reprinted by permission of the Editor.

[2] Fisher Unwin

society?" Some of us can also remember that this apparently abstract question became almost "front-page news," and that it ultimately resulted in the formation of an association with a journal which still appears, viz. the *Sociological Review*. In fact, the first two chapters of Dr. Trotter's book were published as articles in that Review in the years 1908 and 1909, i.e. five years before the outbreak of war, and seven years before the publication of the book itself. Thus it was clear, that the book was no mere hasty production of the author's mind.

Put very shortly, the main argument of Dr. Trotter's book is this. Man, like many other animals, is, even in his most primitive form, a gregarious animal, i.e. long before he develops highly organized institutions like the family, the clan, the tribe, or the nation, he lives in undifferentiated aggregates which have, apparently, just "happened," perhaps merely owing to local propinquity, but which, obviously, exercise a powerful influence on the conduct of their individual members. Such instances are, of course, rare in modern times, the classical example being the Australian so-called "aborigines"; but the records of History mention others, e.g. Huns, Tartars, Scythians, Mongols, Aztecs, which were probably of the same kind. And, in Dr. Trotter's view, as we gather, this may be regarded as the normal matrix from which the highly organized modern human social groups have derived.

NON-HUMAN SOCIAL GROUPS

We must, of course, remember that gregariousness is by no means confined to human groups. On the contrary, it is, as everyone knows, widespread among other animals, e g. sheep, dogs, wolves, birds, and elephants; though there are yet other animals, e.g. cats, eagles, tigers, sharks, which are, for the most part, solitaries. It is, indeed, from a study of the non-human herd-group that we get our richest material for the study of the herd-instinct.

For, if we ask ourselves for what *purposes* are these herd-groups associated, we are in danger of lapsing into an anachronism Such a question is legitimate in the case of organized human societies, and is, indeed, a frequent and important subject of discussion But a " purpose " implies something in the nature of an object consciously set before an intelligent mind , and we have no reason to assume the possibility of such a phenomenon in the case of a non-human herd The tie which binds its members together is something between mere reflex action and reasoned purpose ; and, apparently, we can find no better name for it than " instinct," or reaction to environment

But, if we cannot demand a " purpose " for a non-human herd, we can, at least, study its characteristics, which, in any given type, appear to be singularly persistent and uniform. Thus, for example, we can say, that the dominant characteristic of the wolf and dog groups is their aggressiveness ; though in the case of the dog, large allowances must be made for his long and profound association with Man. The dominant characteristic of the sheep is timidity , and, if we insist on a " purpose " for a flock of sheep, we must call it self-protection. Most interesting, perhaps, of all types of gregariousness is that of the bee, made widely familiar by the well-known studies of Maurice Maeterlinck It is, indeed, in spite of what has been admitted, almost impossible to deny a " purpose " to a swarm of bees, the purpose of " production " ; though the swarm also betrays a striking characteristic of the aggressive herd, in its periodical and ruthless slaughter of the drones

One more question presents itself, imperatively, in the study of the herd, before we come to Dr Trotter's main thesis By what means does the non-human herd, presumably without anything beyond a very rudimentary and " semantic " speech, control its members ? We must, probably, assume, that a dim realization of the advantages of common action explains the coming *into* existence of the herd. But, equally, we must assume that the herd has

some means of communicating its wishes to its members.

The most obvious suggestion is, of course, that the herd follows "by instinct" the strongest, cleverest, or oldest of its members, according to its characteristics. The aggressive herd follows the strongest and fiercest—*qui gregem regit* (as the old law codes put it). The timid and peace-loving sheep follows the oldest and, as it seems to him, the wisest of his herd. The swarm is dominated entirely by the queen bee, whose amazing fertility seems to embody the very spirit of the swarm. But, on occasions of alarm or urgency, something more precise is needed; and, in the absence of articulate speech, they can only be, one would assume, something in the nature of signs, vocal or manual, to supply this need. Conspicuous examples are, of course, the bark and the tail-wagging of the dog, the howl of the wolf, and the trumpeting of the elephant The individual who neglect or disobeys these signals, is expelled from the herd, or, presumably, is left to perish in solitude. For the rest, the practice of imitation, which is so powerfully developed in primitive types, perhaps does the rest.

SUGGESTIBILITY

Finally, we come upon a mysterious, but most important feature of herd-life which, if it does not explain, at least illuminates its nature. This feature, goes by the awkward, but practically useful, name of "suggestibility." It is happily described by Dr. Trotter as "a capacity for accepting reason or unreason if it comes from a proper source"—by "proper" meaning, presumably, what the individual addressed regards as proper, i e. authoritative. The classical example (of course quite apocryphal) is that of the negro who slipped on a piece of banana skin in a New York street of sky-scrapers To him, as he sat dazed, rubbing the back of his damaged head, a benevolent-looking Senator said: "Poor man, you fell out of that eighth-

floor window" The darkie, his mind intensely relieved, replied: "I b'lieve you, boss. But what puzzles me am, how I done get to dat eighth floor, and why I was lookin' out of dat window"

For the moment, let us leave that point, and come to what seems to be the main thesis of Dr Trotter's remarkable book—viz that this herd-mentality, on the main features of which we have touched, though in human society it has been overlaid by successive additions of what we call by the comprehensive name of "civilization" (mostly the product of intelligence and the conscious adaptation of means to ends), has never really been eliminated from the human mind, but has only retreated into unconsciousness, ready to awake in the presence of extreme strain, sudden danger, panic, or other shock, because, in comparison with the triumphs of reason and religion, it is really a more fundamental part of what may be called the human make-up Needless to say, the horrors and sufferings of the Great War, and the wars which have followed it, are typical examples of the kind of shock which revives it; and it is at least striking to note how many of the features of what may be called the "herd-complex" reappear in the rapid development of Fascist methods throughout the world

To return to the very important feature of what we have called "suggestibility." It would not, of course, be fair to put into the mouth of a responsible Fascist the words attributed, in our apocryphal story, to the New York Senator. But the writer of this article has happened to read a careful exposition of what he himself describes as "British Union policy" by Sir Oswald Mosley, the acknowledged "leader" of English Fascism, and found in it a passage which, no doubt in less extreme form, is really a clever appeal to exactly that quality or feature of the herd-mind, viz its "suggestibility" In it Sir Oswald, writing of the English Parliamentary system, describes it as "a curious and temporary aberration of the human mind that great nations

should elect a Government to do a job and should *then* elect an Opposition to stop them doing it."[1] This, we are given to understand, is not intended to be taken as clever display of verbal fireworks, but as a considered and solemn accusation against Democracy. The facts (1) that the electors do not, at least directly, elect a Government at all, but only members of the House of Commons, (2) that each elector presumably hopes that the candidate for whom he votes will be on the side of the Government (not, of course, necessarily the Government in office at the date of the election), (3) that the House of Commons is, historically and actually, intended to represent the whole of the electors and to reflect their varied opinions, and not to carry on the business of government at all—these facts have, apparently, never been considered by Sir Oswald; for we cannot assume that he is so ignorant of English Constitutional law and history as not to be aware of them. Reluctantly, it seems, we must conclude, that he is trusting to the "suggestibility" of his herd, or, as another even better-known Fascist "leader" puts it in his well-known book, he is aiming at the lowest level of intelligence in his audience. And if we point out that, in addition to this "suggestibility," we note the use of "salutes," cries ("Heil Hitler," etc.), firing of cannon, flood-lighting, the "goose-step," and other "semantic" methods, among Fascist amenities, we cannot help being struck by the resemblance of the Fascist crowd to the herd of the pre-rational age, a herd, alas! of the aggressive kind. The Fascist organization is, in fact, the result of a well-known biological process known as "reversion to type." Needless to observe, there is no room for Democracy, or democratic methods, in the activities of the herd-group, or in its modern revival. The business of its members is not to think, but to obey blindly. We must look for democratic methods elsewhere.

But, before doing so, it is well that we should make one

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[1] *To-morrow We Live*, by Oswald Mosley, p. 5. Abbey Supplies Ltd.

observation A very distinguished English jurist of the nineteenth century, the late Sir Henry Maine, published, towards the end of his life, a work which, coming from such a source, naturally attracted great attention It was entitled *Popular Government*;[1] and its main thesis was that Democracy was (only) a "form of Government." With great respect to an author to whom he, with countless others of his day, owes so much, the writer believes that Democracy is much more an attitude towards life than a mere form of government, though it doubtless produces governmental forms which are specially characteristic of this attitude To take an obvious test Is it necessary to a democratic Constitution that it should be cast in a Republican form? May not a so-called Constitutional Monarchy be equally democratic with a Republic? Few English thinkers would return a negative reply to this last question, but, if this is the case, how can we content ourselves with the definition of Democracy as (only) a "form of government"? To the mind of the writer, at least, it is necessary to go beyond forms, and consider the spirit of institutions

All government consists of, or at least comprises, two elements authority and co-operation Even the most "autocratic" Government can hardly carry on in the face of a "sit-down strike," as the circumstances connected with the career of Mahatma Gandhi sufficiently prove On the other hand, despite the theoretical claims of the extremer type of Communist, no modern nation of any size can, apparently, carry on its government except through the agency of what we call a "State," i e a fixed organ or complex of organs, of authority

But, in communities of the Fascist type, the rôle of authority is overwhelming, that of co-operation is almost eliminated The "leader" is assumed to have a monopoly of wisdom, the rôle of his subjects is to obey, without

[1] John Murray.

criticism, aided by the stimulus of the "semantic" gestures before described, whereas, in Democracies, the State claims no infallibility, even though it, alas ! clings to the old fallacy of " sovereignty." The stress is laid on co-operation, not on authority ; and, though the State claims a monopoly of the exercise of force, it by no means claims a monopoly of wisdom. On the contrary, it includes organs expressly devised for the tendering of advice, the ventilation of grievances, and the utterance of free criticism, which so shock Sir Oswald Mosley, that he regards them as evidence of mental aberration. For the democratic State believes (and who shall blame it ?), that the wealth of ability and experience stored up in the minds of the individual members of a civilized community are a priceless reservoir of political, economic, social, and intellectual strength, to be used to strengthen the Government which acts in its name After all, to appeal once more to a brutal test, the democratic communities won the Great War, not the autocracies. There were no " stabs in the back " among the democratic nations. It was *their* war, not merely the war of their Governments ; though it may have been their Governments which led them into it.

But we need not end on an appeal to force, which is, after all, not an elevated ideal. For Democracy represents, not a reversion to type, but a conservation of the wisdom accumulated by the long series of triumphs which have signalized the ascent of Man, from the naked savage of the primeval steppe or forest to the highest achievements of civilization. As Man's marvellous brain, with its developing cells, first separated him from the brutes, and caused him gradually to shed the gross superstitions of his infancy and replace them by the light of reason, so gradually he built up, as mile-stones on his long journey, institutions—social, political, economic—which demanded ever more and more co-operation among his fellows Sad lapses there were, in climbing the golden stairs. As has been suggested by one whom Mr. and Mrs. Webb, in their monumental

study of Soviet Russia,[1] describe as an "acute thinker," the progress of civilization seems to take the form of a series of curves, not of a straight line, the depressions of the curves being caused by the unwillingness of the more fortunate members of society to share their good fortunes with their less-favoured brethren

But, even if this be true, there is little reason to suppose that such lapses are likely to be less frequent under Fascist rule than in Democratic communities. On the contrary, the more authority associates itself with the people it governs, the better it learns to know them and lean on them, the more it discards the pathetic illusion that bluster is evidence of wisdom and strength, the less likely are these lapses to occur It may well be, that democratic institutions, as we now know them, will undergo great changes in the future But, so long as these changes are in the direction of developing the co-operative element in government and softening the authoritative—which is what we really mean when we talk about political freedom—so long are we on the lines which History, that impartial interpreter of Man's fate, has laid down for us And these changes will come, without bloodshed or violent revolution, by following the principles of Democracy

One more reference to the important matter of "suggestibility" may, perhaps, be permitted It is one of the strongest weapons in the armoury of Fascist "leaders" to make their followers believe that, in the matter of "strength," whether or not through "joy," the Fascist community is immeasurably superior to its Democratic rivals Even if the word "strength" be confined to military strength, the claim is, as recent history has shown, more than doubtful But if we give to the term its wider meaning, to include intellectual ability, material resources, and what may be termed "social courage," the believers in Democracy can safely take the view, not, of course, with

[1] *Soviet Communism, A New Civilization?*, p 1,140 (Private Subscription Edition)

indifference, but with the most profound conviction, that the resources of Democracy, if wisely used, are infinitely superior to those of their rivals. The one danger in the position is, that, in a spirit of defeatism, the Democracies should allow the Fascists to "get away with it"

A METAPHYSICAL EXPLANATION OF FASCISM

Since the above lines were written, there has appeared an English edition, by an American author, of a penetrating and attractive study of the nature of Fascism.[1] Although the writer of these pages does not accept the main thesis of Mr. Ashton's book, he feels that, in the interests of justice, he should state, as briefly as possible, the nature of that thesis, together with the reasons which make him feel obliged to reject it At the same time, he must not be held to suggest that Mr. Ashton has, despite the impartial tone of his book, any personal leanings towards Fascism.

Put shortly, Mr Ashton's thesis is . that the essential difference between Fascism and Democracy is, that the former pre-supposes the existence of the State and derives from it the duties and rights (if any) of the individual, while the latter assumes that the State is the creation of individuals to serve their own purposes.

This apparently startling pre-supposition of the Fascist mind will not, of course, surprise anyone who is familiar with the history of political thinking. It is based on the famous and attractive analogies between the body politic and the material body, of which Hobbes' *Leviathan* is perhaps, to English readers, the most familiar example. As the material body is to the cells of which it is composed, so is the State to the individuals under its sway. Therefore, runs the argument, as it is impossible for the cells of the human body to act independently of the body as a whole,

[1] *The Fascist, His State and His Mind*, by E B Ashton English edition, Putnam, 1937.

so is it unthinkable that the individual, living in a community, should have any life independently of the life which animates the community.

The writer of these pages does not claim to have sufficient acquaintance with biology to be sure of the precise ante-natal relations of the foetus and the cells of which it is composed He will not, therefore, put the question whether the suggestion that, in a political community, the State can be conceived of as creating the individual does not involve the difficulty that the created is older than the creator He prefers to make two practical criticisms of the alleged Fascist theory of the State.

The first is, that, in this theory, the State is, as Mr. Ashton freely admits, an "abstraction," i.e. a purely metaphysical concept having no material content. But, if this is so, and it has a mere fraction of the influence and activity attributed to it by the theory, it must have at least one unmistakable means of conveying its will to the individuals who are, *ex hypothesi*, the subject-matter of its operations, i e the individuals whom it creates and controls. What is that means? We know, as a fact, that those individuals receive commands from various other individuals, though we may *not*, in any given case, know who these individuals are. Is it to be assumed that these individuals are survivors of some prehistoric race, or some superhuman manifestations like the ancient oracles? And, if not, how are they designated? Upon this very important question Mr Ashton gives us little or no help In the passage of his book which discusses the topic of authority, he becomes almost mystical, and speaks of the source of authority as the "higher unit," or "Germany," or "Italy," words which are obviously capable of many different meanings [1]

The second criticism to be passed upon Mr. Ashton's theory of Fascism is · that it is clearly contrary to the facts of human experience. It is the metaphor of the "organism,"

[1] *Op cit*, pp 34-8

not merely worked to death, but breaking down at a vital spot. We know that the individual human being is capable of volition, of acting entirely "on his own," if he is prepared to take the consequences But there is no evidence whatever to show that the cell of an organism is so capable. It has been faintly suggested, that the development of local disease or malformation is evidence of independent volition on the part of the limb effected. But there appears to be no evidence whatever that such occurrences are due to any spontaneous volition on the part of the "cells" included in the limb in question. At any rate, to compare such occurrences with the activities of individual human beings is almost grotesque. Is it not, in fact, a contradiction in terms, to speak of an "individual" as an entity which can be divided?

On the whole, in spite of Mr. Ashton's persuasive reasoning, there seems to be little reason for preferring it to the explanation of Fascist mentality given in earlier pages of this book.[1]

[1] *Ante*, pp. 161-2.

CHAPTER XI

The State and Its Neighbours

IT has previously been pointed out in these pages, that the State is only one, though one of the most important, of the many forms of association which Man, the social animal, adopts for carrying out his purposes Other familiar forms are the Church, the Family, the Industrial Partnership, the Commercial Company ; and that these various forms of human association have many features in common, appears from the common use of language Thus, for example, we speak of the secretary of a company as well as of a Secretary of State, a State Department as well as the department of a distributive store, a Minister of State as well as the minister of a Church , and it is quite obvious that all the various institutions in which these forms of association are embodied, or, as it is the fashion to call it, "organized," may be brought into contact with one another Thus, for example, one family may be brought into intimate relationship with another by marriage, or one company with another by the intercourse of the market, or one Church with another by the undertaking of a common mission And these relationships may be friendly or hostile.

ESSENTIALS OF INTERNATIONAL INTERCOURSE

But if we carry out minds back to the earlier chapters of this book, in which the nature and history of the State were discussed, we shall probably be able to realize with-

out difficulty certain of the essential characteristics of a State which render its intercourse, whether with other States or with associations of any other kind, a very different thing from the intercourse of any other forms of association, at any rate at the present day. These essential characteristics are usually summarized in the legal term "sovereignty," which, as has before been pointed out,[1] though first used merely to indicate any prominent office or person, has, owing to the perhaps excessive enthusiasm of generations of international jurists, acquired a highly technical meaning, which implies a claim to the monopoly of the exercise of physical force within a specified area of the earth's surface, over all persons whatsoever thereon.

Of course it is not suggested for a moment that the only function of the State is the exercise of physical force In fact there are States which, though claiming to the full the monopoly of the exercise of force, make also unlimited claims to the controlling of thought, belief, and even art and taste, which, obviously, cannot be produced by physical force, though the expression of beliefs and ideals inconsistent with the views of the State on those subjects can, at any rate to a certain extent, be prohibited by the exercise of physical force. But, it is, probably, psychologically true, that, as in individuals so in institutions, it is the most striking features of this character which tend to be encouraged and developed At any rate the well-known epigram: "The State is Force," attributed to the influential German political philosopher Treitschke, has been widely accepted; and Treitschke himself was honest enough to admit, that, as Force was the essential feature of the State, so the State (i.e. statesmen and rulers) tended naturally to rely more and more upon it. But it will not escape the attention of the thoughtful person, that the claim to the right to exercise unlimited physical force over human beings is in the modern world, essentially a claim to use violence, by any

[1] *Ante*, pp 15-16.

means which the acheivements of modern science can produce, against any person or persons whatsoever, for any reason whatsoever, including the upbuilding of the character of the persons who exercise it It is true that, from motives of prudence and decorum, the claimants of these unlimited rights usually limit the exercise of their claims to a particular area of the earth's surface. But, if it is desired to extend this area, what simpler than to exercise more force, physical or mental, to increase the area?

BACKGROUND OF WAR ATTEMPTS TO ESCAPE

And, the greater part of the earth's surface being now claimed as being under the general control of territorial States, though under different forms, it thus becomes inevitable, that any claim by one State to increase the area under its control, should threaten the control of another, and that, if the exercise of physical force is the accepted method of enforcing or resisting that threat, the moment that such a claim is made, the spectre of war, with all its horrors, looms on the horizon We have seen at an earlier stage that this danger was realized almost immediately on the break-up of the Western Roman Empire in the fifth century AD, and that it was intense, in Europe at least, during the succeeding three centuries, traditionally known by the ominous name of the "Dark Ages." We have seen, also, that the Christian Church made a gallant, but not completely successful, effort to act as a pacificator during that stormy period, and that a really important step to substitute order for anarchy was brought about by the reinforcement, at the end of the eighth century, of the spiritual Empire of the Popes by the secular Empire of Charles the Great This Holy Roman Empire was by no means a complete failure, though its success was not perfect One significant reform took place in its organization, when, in

A.D. 911, its secular Head was made elective,[1] and eligible from among all baptized Christian men ; a step which was followed, some two centuries later, by the assumption of the right to elect its spiritual Head, by the College of Cardinals. It almost looked as though, after these democratic reforms, the Dual Monarchy of Pope and Emperor might succeed in establishing the reign of international law in Europe

FAILURES

But, as we have also seen, this hopeful prospect was shattered by the religious Reformation in the sixteenth century, and the long Wars of Religion which followed, which split the Holy Roman Empire into two irreconcilable parts. Though it lasted nominally till 1806, its power as a conciliator was gone by the end of the seventeenth century During the many wars of the succeeding century, international law, founded by Grotius' famous book, the argument of which has been previously outlined,[2] was the main authority on international law in Western Europe ; and its " dictate of right reason," supplemented by precedents mainly drawn from classical sources and the treatises of a few of Grotius' successors, supplied what little control of international disputes existed. Meanwhile, an elaborate system of diplomacy, represented chiefly by the more distinguished ambassadors whose function was described by a wit as persons " sent to lie abroad in the service of their countries," carried on the discussion of international questions. This was, in fact, the Age of Ambassadors ; for, in the days when travel was tedious and difficult, and there were then neither telegrams, wireless, nor aeroplanes, the resident at a distant Court had the game very much in his own hands

[1] The " Electors " were only gradually established One of the latest was the ruler of Hanover Their titles were borrowed from the offices of the old Roman Empire

[2] *Ante*, pp 17-18

Then came the epoch-making events of the French Revolution, which once more plunged the States of Europe into a series of wars which lasted until the final victory over Napoleon in 1815. In striking contrast with the Great War of 1914-18, which plunged Europe into revolutions, the result of the French Revolution was reactionary and constructive, rather than bellicose. On the whole, Europe was tired of war, though the Crimean and the Franco-Prussian wars were not mere skirmishes Not unnaturally, there was more than one attempt during this period to remedy the weaknesses of the international system.

For example, immediately after the Peace of 1815, the so-called Holy Alliance of three great Conservative States, Russia, Austria, and Prussia, was formed, ostensibly with the object of preventing the outbreak of war But, though the restored monarchy in France actually joined the Holy Alliance at once, the preservation of the *status quo* remained for some few years the sole policy of the Alliance ; and, in the hands of Metternich and the Czar, it became chiefly an instrument for putting down by force any attempt to liberalize the autocratic constitution of Europe Great Britain openly refused to support it in 1822 ; and it disappeared completely in the revolutionary year 1848, when Vienna, Frankfort, Berlin, Prague, Buda-Pesth, Munich and The Hague experienced revolutions quite inconsistent with its policy

THE GREAT POWERS

Meantime, a vague but not altogether unsuccessful organization known as the " Great Powers," or the " Concert of Europe," in which Napoleon III was a prominent but not altogether popular figure, maintained, more or less perfectly, a somewhat uneasy peace between the Powers of Europe, by the holding of meetings or conferences, each after some crisis, to which only those States particularly

interested were invited.[1] Then followed bolder attempts, notably two at The Hague, in 1899 and 1907, curiously enough on the initiative of Russia, where the more liberal-minded Nicholas had succeeded his father; and to these the smaller States of Europe, and, in 1907, the States of South America, were invited to send representatives Their general objects were to substitute the methods of arbitration, by persons voluntarily chosen from a panel of arbitrators, for war in the case of international disputes, and to codify by general agreement the laws of war. This panel is still in existence; but its importance has been lessened by the appearance of another institution, the Permanent Court of International Justice, to be hereafter described, which has taken over, not only much of its functions, but the handsome Peace Palace built by the Scottish American millionaire, the late Mr. Andrew Carnegie, to serve as a memorial and home for them. Some countries, e g. France and Great Britain, had even gone so far as to establish permanent treaties involving a resort to The Hague on the occasion of the development of any international dispute between them; and the number of what may be called "spasmodic" cases of international arbitration between 1899 and 1914 was very considerable.

Once more, the gradual growth, especially in Europe, during the nineteenth and early twentieth centuries, of "unions" or "associations" of a positive character, directed to carrying on international co-operation for various objects, was gradually building up a system which, even if it was not wholly concerned with State action, was powerfully contributing towards a change in what must, perhaps, regretfully be described as the "natural" atmosphere of inter-state relations Many of these unions or associations are of a purely private nature, i.e Governments take no responsibility for their working; but others are worked by Government delegates, and thus come

[1] e g the Congresses of Constantinople (1876), Berlin (1878).

practically into the sphere of international relations. Examples of the former are the International Fixed Calendar League, the League of Red Cross Societies, and the International Hospitals Association; of the latter the enormously important Postal Union and the International Danube Commission. Both kinds, especially the latter, contribute greatly to the interdependence of nations, and thus stimulate the growth of that atmosphere of international co-operation which is, perhaps, the most direct and powerful antithesis to the disastrous influence of the anarchic theory of political sovereignty.

THE LEAGUE OF NATIONS

But, of course, by far the greatest, most ambitious, and most comprehensive of all attempts to replace international friction by international co-operation is the setting up, at the close of the Great War of 1914-18, of the League or Society of Nations, which, if it does not aim at substituting for the existing rudimentary organization of international life a new organization of a comprehensive and binding character, at least attempts to make deep inroads into the previous wholly independent existence of sovereign States, instigated chiefly, if not solely, by individual treaty arrangements between States or groups of States, and by the rather vague rules of international law.

APPEARANCE OF THE LEAGUE

Most readers will be aware of the circumstances in which the League came into existence. Its first systematic efforts towards life came from America, in the form of the League to Enforce Peace, organized in 1915 under the auspices of ex-President Taft of the United States, at that time a neutral Power, and this fact probably accounts for what the writer has always regarded as the unfortunate title ultimately adopted in the English version of the Covenant

or Constitution of the arrangement produced by the Treaty of Versailles. For the word "League" almost inevitably suggests a warlike organization; and there is, alas! only too much reason to fear that the belligerent spirit is not entirely absent even from the Covenant.

Fortunately, however, the entry of the United States into the Great War, vital as it was in many ways, did not prove fatal to Mr. Taft's suggestion. Rather it brought to its assistance the powerful help of President Woodrow Wilson, who, at the Armistice of 1918, was, possibly, the most influential political personage in the world, and who became the chief architect of the scheme, though the plan was warmly and eloquently supported by Lord Robert Cecil (now Lord Cecil of Chelwood), Lord Phillimore, Colonel House (the intimate adviser of President Wilson), and General Smuts, Prime Minister of South Africa The latter's special contribution to the scheme was that of the Mandatory Power, a most valuable alternative to the crude doctrine of sovereignty, which owes much of its characteristics to the long labours of the English Equity judges in working out a doctrine of Trusts. But, though the influence of the English-speaking peoples is manifest in the scheme of the League, it must not be supposed that it is a peculiarly Anglo-Saxon device. The eloquent support of the French statesman, M. Léon Bourgeois, is sufficient proof to the contrary; and, indeed, during the twenty years which have followed the adoption of the Covenant, there have been no stauncher, though perhaps in some respects there have been more prudent, supporters of collective security, than the French.

It is, perhaps, wiser, and will save time in the long run, if we group our description of the chief features of the League of Nations under the two heads of principles and machinery For those readers who desire more, in addition to the text of the Covenant, there are admirable and brief summaries published under the auspices of the League itself; and these have, of course, an authority which the

work of an outside exponent cannot claim.[1] To these the reader who finds the following description inadequate may be referred We begin with the principles of the League.

PRINCIPLES OF THE LEAGUE

In the first place, there is nothing exclusive about the membership of the League Unlike the old Congresses of the Great Powers, the League is open to "any fully self-governing State, Dominion, or Colony" (Art. I), thus skilfully avoiding the technical difficulties arising out of the use of the word "sovereignty" As a matter of fact, thirty-two States, by signing the Covenant, became *ipso facto* original Members; while of thirteen others, expressly "invited" by the Covenant to join, twelve accepted the invitation before the end of 1920, thus making the initial membership of the League forty-four.[2] There have since been other participants, bringing the total membership to sixty-four, less four (Japan, Germany, Brazil and Costa Rica) who have since resigned their membership. Thus the League is entirely a voluntary association, resting on the co-operation of its members, and, in theory, universal

In the second place, the majority vote, except for minor purposes, is not adopted by the League; and thus its voluntary basis is further emphasized A minority cannot, in substantial matters, be overruled by a majority, and this fact, combined with the express power reserved to every member to resign his membership, and the further fact that the admission of new States can only be effected by a vote of two-thirds of the Assembly (the major organ of the League), deprives the League of any compulsory

[1] e g *The Aims, Methods and Activity of the League of Nations*, Geneva, 1938, *The League from Year to Year, 1937*, *Essential Facts about the League of Nations, 1937* These can be purchased through George Allen & Unwin, London

[2] The great and lamentable exception was, of course, the United States of America, the home of President Wilson himself, whose Senate refused to ratify the Treaties

character and thus renders it impossible for it to claim the character of a "super-State," to say nothing of the final fact that, having no executive organs, it is unable to put forward any pretensions to what, as we have seen, is one of the essential features of a true State, viz. the power, or at least the claim, to the exercise of unlimited physical force.[1] Whether it has, as apart from its members, any independent existence at all, or is merely an immensely important and complicated Treaty, becomes, therefore, rather a question of nomenclature than of practical importance

The object or purpose of the League, though not quite so comprehensive as its membership, is sufficiently wide to open up a vista of almost unlimited activity. It is set out in Article XI (1) of the Covenant. "Any war, or any threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League ; and the League shall take any action that may be deemed wise and effectual to guard the peace of nations" Any Member may, in case of "such emergency," request the Secretary-General of the League forthwith to summon a meeting of the Council of the League (Art. XI). In addition to this fundamental charge, the Covenant imposes upon the League two other obligations sufficiently comprehensive to require separate and early mention. One is, the duty of permanently guaranteeing the existing territorial integrity and political independence of all Members of the League (Art X) ; and, in order that there may be no doubt about the theoretical basis of this obligation, it is expressly provided (Art XVI

[1] As is well known, there is, in England, a movement, supported by eminent and public-spirited persons, whose object is to provide the League with an international military or police force, and thus to enable it to give effect to its resolutions like a true State Of this movement the writer prefers to say only that it appears to be a somewhat inconsistent aim to convert an institution whose chief object is to prevent war into an instrument for waging war. A more practical objection to the movement is that, in present circumstances, it is hardly possible to conceive of its accomplishment except after another major war

(1)) that if, in defiance of the obligation existing upon all Members of the League to submit any dispute which may arise between them to the appropriate form of conciliatory procedure (Arts XII, XIII, or XV), any State shall, instead, resort to war against the other party to the dispute, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which undertake thereupon to sever all trade or financial relations, and all intercourse between their nationals and the nationals of the covenant-breaking State (Art. XVI).[1] Thereupon it will be the duty of the Council of the League to recommend to the several Governments concerned what effective naval, military, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covents of the League

DISARMAMENT

The other obligation of a major but indirect kind imposed on all Members of the League (Art VIII) is the "recognition" that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligation It is obvious that such a comprehensive, yet, at the same time, vague obligation requires for its fulfilment an elaborate machinery which cannot be stated in brief and imperative terms; and, as a matter of fact, an enormous amount of time and energy has been employed through the agency of the League towards the object contemplated by the Article, with, unfortunately, little success hitherto.

COURT OF INTERNATIONAL JUSTICE

One other major obligation laid upon the League by

[1] This Article is under amendment but the amendments have not yet obtained sufficient ratifications to enable them to take effect It is believed that the Article has never yet been acted on

the Covenant deserves mention by reason both of its importance and its successful achievement, the establishment of the Permanent Court of International Justice by Article XIV. We have already seen[1] that not wholly unsuccessful attempts to encourage the substitution of arbitration for violent measures were made at The Hague Conferences in 1899 and 1907 on the initiative of Russia. But these resulted in a framework which could be invoked only on the initiative of parties to disputes; and, obviously, had serious limitations. The Covenant of the League aimed at something more permanent and conspicuous, and, in fact, by Article XIV, laid it down that "the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice." But, again emphasizing the purely voluntary character of the League, the Article goes on to say that "the Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it*, as well as to give any advisory opinion upon any dispute or question referred to it by the Council or by the Assembly" Under Article XIV of the Covenant, the Court was brought into being by a Statute adopted by the Council and Assembly of the League in 1920, which has since been amended The Court consists of fifteen Judges, elected by an absolute majority, both in the Council and the Assembly of the League, for a period of nine years, from candidates put forward by the panel of arbitrators set up by the Hague Congress of 1899 and 1907, previously referred to, acting on a rather complicated plan, intended to preserve a fair balance between the various countries whose disputes are likely to come before the Court. At the expiry of their respective terms, they are re-eligible The principle of Article XIV is still preserved in contentious matters, viz. that the Court can only decide cases which the contending

[1] *Ante*, p 174

States submit to it But, by an ingenious and beneficent interpretation of the principle, the Statute has recognized that this submission may be given in advance and once for all (either for all cases or for some classes of cases) by what is known as the "optional clause" embodied on Article XXXVI of the Statute of the Court as amended in 1936. No less than thirty-seven States had up to 1936 brought themselves, to a greater or less extent, under the optional clause, and, between 1922 and 1936, the Court had had before it seventy-one cases, of which forty-three were contentious Though the Permanent Court has no executive machinery for the enforcement of its decisions, it is believed that its findings have never been defied. It is noteworthy that, in three important features at least, the Court has followed English rules, viz normal hearing in open Court, delivery by each Judge of his own personal conclusion (the majority view being adopted), and the publication, in the judgment, by such Judges as desire it itself, of the reasons on which it is based Any dissenting judges record their individual opinions. These are the great safeguards of justice.

Passing now from the principles and objects of the League of Nations to the machinery by which it works, we shall naturally first be interested in what would, in the case of a State, be called its "Constitution" Of this the two essential organs are the Assembly and the Council.

MACHINERY OF THE LEAGUE

The Assembly is a large body of representatives of the Members of the League, appointed annually by the Member States, i e by their Governments Each State is entitled to appoint three representatives; but the representatives of each State cast only one combined vote at any meeting or session of the Assembly. This, though it may occur at any time or place, normally occurs at Geneva, the present seat of the League, in September of each year, on the summons of its President, elected annually at the first

session of the normal meeting [1] Naturally, as there are at present fifty-eight States Members of the League, each of which is entitled to be represented by three delegates, attended by secretaries and experts who, of course, do not vote, but who sit amongst the delegates, a meeting of the Assembly is an impressive sight, especially at its commencement. It is, in fact, impossible for the spectator not to be struck by the spectacle of some three hundred persons from all over the world, many of them persons of weight and influence in their own countries, greeting one another with the utmost apparent cordiality for the open discussion of world-affairs, even though the spectator knows that, as a matter of fact, much of the formal resolutions which will be arrived at by the meeting have been substantially settled beforehand by preliminary conversations in lobbies and hotels.

Of course a body with the numbers and responsibility of the Assembly requires a somewhat elaborate system of Rules of Procedure, corresponding generally with the well-known "Standing Orders" of the House of Commons at Westminster, and an attendant fringe of bureaux and committees, some temporary, others permanent, to which the preliminary stages of business are automatically referred. Space does not permit of a detailed account of these matters, important as they are for the working of the Assembly. Perhaps the most striking are those, both previously mentioned, of the single vote cast by each State delegation, and, even more important still, the necessity for unanimity in all substantial resolutions of the Assembly [2] But it may be mentioned, that the voting in the Assembly is usually open—by roll-call or show of hands; though, not infrequently, if no opposition to a proposal manifests itself, the President, after a suitable interval, declares the proposition carried. The unanimity rule un-

[1] The last elected President holds office till his successor actually assumes office The latter then at once takes the Chair

[2] Perhaps the most striking exception is the rule that admission to the League of new States by the Assembly only requires a two-third majority (Art I (1) of the Covenant)

doubtedly renders the action of the League hesitating and conservative, but its operation is, probably, less hampering than it appears. As it only applies to the States represented at the taking of the vote, it is easy for a delegation not vitally interested in a proposal to absent itself from the meeting;[1] or an opportunity for compromise may appear in the course of the debate Its justification is, that, but for its inclusion, the League would probably never have come into existence.

But it must not be assumed by English readers that the Assembly, though it is, obviously, the democratic organ of the League, has the same overwhelming predominance over its other organs as the House of Commons in the United Kingdom Parliament. In fact, the analogy of the two Houses of Parliament is dangerous; and it is safer to regard the Assembly rather as a reserve force which is called in on specially important questions such as the admission to the League of new Members, the framing and discussion of the League's Budgets, the election of the "non-permanent" member of Council, and the approval of the appointment of the Secretary-General of the League and the Judges of the Permanent Court of International Justice

THE COUNCIL

The other impressive and certainly more active organ of the League is the Council, a much smaller body than the Assembly. Here, again, the English reader should be careful not to be led away by the analogy of Westminster. The Council is certainly not hereditary, on the other hand, it is not wholly elective. Its meetings are far more frequent, and certainly far more often held in private, than those of the Assembly So far from acting as a "check" on the action of the Assembly, it usually takes the initiative in the action of the League, especially the vitally important func-

[1] There is *no* provision, either in the Covenant or the Assembly Rules of Procedure, for a quorum at a meeting of the Assembly. Therefore the absence of delegates does not imperil the meeting.

tion of dealing with a threatened rupture of the peace. But first a word as to its structure, which is peculiar.

The members of the Council fall first into two groups, "permanent" and "non-permanent." When the Covenant was adopted, it provided that the Principal Allied and Associated Powers (the United States, the United Kingdom, France, Italy, and Japan) should have permanent seats on the Council, together with representatives of four other Members of the League, selected by the Assembly from time to time in its discretion (Art. IV(1)). But the Council, with the approval of the Assembly, was also given power to increase the number of each class; and, in 1926 and 1934, it exercised its power by the appointment of Germany and Russia respectively as permanent members, and it has gradually raised the number of non-permanent members to eleven.[1] Germany and Japan having ceased to be Members of the League, the number of permanent members now is four; while that of the non-permanent is eleven Non-permanent members are normally elected for three years, and are not re-eligible for three more But the last rule may be waived in any case by vote of the Assembly.

As at the meetings of the Assembly, each State has only one vote at meetings of the Council. Moreover, it has only one representative Meetings of the Council must be held at least once a year at the seat of the League or such other place as may be decided upon. As a matter of fact, they are usually held three times a year,[2] and, usually, at Geneva; though, again, they have more than once been held elsewhere. Like those of the Assembly, they follow, in general, the unanimity rule; and they are usually held in public. But, unlike those of the Assembly, their proceedings are not

[1] Inasmuch as the last increase, in 1936, is only "provisional," i.e. members elected under it will not have successors when their term expires, they are, sometimes, described by the curious name of "temporary permanent"

[2] Until 1928, four times The change was, apparently, due to the fact that the States represented on the Council liked to send as their delegates, actual Ministers of State, who found it difficult to attend so often.

effective unless a majority of the members of the Council are present. Any member may demand a vote by roll call 1 but the President may follow the informal course of inquiring whether any objection to the proposal is raised. Members of the Council preside in rotation at its meetings.

Among the miscellaneous powers or duties conferred upon the Council by the Covenant, are, to formulate plans for reduction of armaments and to advise how the evil effects attendant upon the manufacture by private enterprise of munitions and implements of war can be prevented (Art. VIII), to propose what steps shall be taken to give effect to arbitral awards or judicial decisions, presumably in international affairs (Art. XIII (4)), to recommend to the several Governments concerned what military sanctions the Members shall severally contribute to the armed forces to be used to protect the covenants of the League (Art. XVI (2)), to receive annual Reports from each Member entrusted with the carrying out of a Mandate for the administration of a non-self-governing territory (Arts. XXII-IV),[1] and various important duties in connection with the protection of racial and other minorities created by the re-allotment of territory under the various treaties which followed immediately on the close of the Great War It will, therefore, be readily seen that, whatever the theoretical relationship of the Assembly and the Council as "organs" of the League, by far the greater share of the actual carrying on of the business of the League falls to the Council.

THE PERMANENT STAFF

Nor will there be any less doubt, that, in order to carry out in detail the duties entrusted to the Assembly and the Council, a large staff of individuals in the permanent service of the League is required, imperatively required, and is, in fact, enrolled This is known generally as the

[1] The important system of Mandates will be explained later on (pp 189-91).

" Secretariat "; and, at its head, is the Secretary General who, if not actually an " organ " of the League, is so essential to its working, and has such great administrative powers, as almost to occupy that position. The first occupant of the post, the present Lord Perth, was, as Sir James Eric Drummond, actually appointed by name in Annex II of the Covenant ; and, after fulfilling his duties with brilliant distinction for twelve years, he resigned, and was succeeded by the present holder, M. Joseph Avenol, on the unanimous nomination of the Council, with the unanimous approval of the Assembly. The Secretary-General has not only the appointment and removal, subject to the approval of the Council, of every member of the Secretariat, but is responsible for the general work of all the sections of the Secretariat in so far as policy or decisions upon questions of principle are involved. Both he and every member of the Secretariat, positions in which are open equally to men and women of all nations, and who, at the present time, number about six hundred, enjoy, when engaged on the business of the League, diplomatic privileges and immunities ; and the more important of them, though not ceasing to be nationals of their own States, make, on their appointments, a public declaration of loyalty to the League, and promise not to seek or receive instructions from any Government or other authority external. Moreover, in order to preserve its international character, the members of the Secretariat are chosen with a view to maintaining a sound geographical distribution of origin ; and, though it is possible that this rule militates to a limited extent against the principle of efficiency, there can be little doubt that it is necessary to prevent any suspicion that a small number of particular States are " running " the administration. Needless to say, however, that this large body of officials requires an elaborate internal organization, to prevent overlapping and waste of time ; and it can hardly be doubted that, whatever is the state of affairs at the present day, as time goes on, the Secretariat

of the League, like the League itself, will acquire a personality which will have a definite influence on international politics One of its most important duties is to keep a careful record of all treaties entered into by the Members of the League, and publish them , for no such treaty has any binding force until it is registered with the League (Covenant, Art XVIII)

INTERNATIONAL LABOUR ORGANIZATION

In addition to the Auxiliary Organizations devised to carry out the main purposes of the League, many of them of first-rate importance, of which limitations of space do not permit of detailed information,[1] there is one which, both by reason of the fact that it is expressly foreshadowed by the Covenant (Art XXIII (b)), as well as its inherent importance, requires a brief description in any account of the League, viz the International Labour Organization The Article in question binds the Members of the League to endeavour to secure and maintain fair and humane conditions of labour for men, women, and children both in their own countries and in all countries to which their commercial and industrial relations extend. In pursuance of this obligation, not only all the Members of the League *ipso facto*, and even some few who have ceased to be, or never have been, Members, are, of their own free will, members of the Organization,[2] which itself operates under three forms—the Conference, the Governing Body, and the International Labour Office The first of these, consisting of four delegates of each of the Member States,[3] meets at least once a year for the general discussion of Labour ques-

[1] A list of these will be found on pp 84-5 of the *Essential Facts about the League of Nations* They include such important groups as the Committee of Intellectual Co-operation and the Health Organization Brief but comprehensive outlines of the working of these will also be found in the work last alluded to

[2] A notable instance is the United States of America

[3] Two representing the Government, and two representing the employers and the workmen respectively.

tions The Governing Body, consisting of thirty-two members, of which sixteen represent the States Governments (half appointed by the chief industrial nations and half by the other Government delegations at the Conference), eight by the employers' and eight by the workers' delegates at the Conference, meets approximately every three months, and acts as a kind of executive for putting into practical form the results of the discussions at the Conference. The International Labour Office corresponds with the Secretariat of the League, but under a Director appointed by the Governing Body, with a large number of assistants. It has not only a substantial headquarters at Geneva, but branch offices or national correspondents all over the world ; while the members of its staff constantly travel in distant countries to effect personal contacts with influential persons in the Labour world.

The main objects of the International Labour Organization are to formulate, and, so far as possible, to persuade the States Members to accept and put into force, Conventions regarding the conditions of labour in their respective countries. Naturally, they cannot compel any of these States to accept any such Conventions, even if these have been accepted on the proposal of the Governing Body on which they are represented, and actually by their own representatives at such Conferences. Notwithstanding, forty-one of such Conventions have already come into force, representing no less than seven hundred and twenty-three ratifications by Member States. Further, if a Member State which has accepted a Convention fails to secure effective observance of it in its own country, any industrial association of employers or workmen may make representations to that effect to the International Labour Office ; and the Governing Body may then get into touch with the Government alleged to have defaulted, and publish the correspondence. Finally, any Member State may lodge a complaint which may be followed by a Commission of Inquiry, and, ultimately, even a resort to the Permanent

Court of International Justice These quasi-remedial measures are, of course, of great importance, inasmuch as one of the chief obstacles to Labour reform in a State otherwise predisposed to adopt it is to be found in the unfair competition of an industrial competitor who, by refusing to enforce reform legislation which it has professedly adopted, may penalize its competitors by under-cutting through cheap labour and lack of industrial safeguards.

MANDATORY POWERS

Finally, in spite of the inevitable limitations of space, it is necessary to refer again to what is, in the writer's view, one of the most important results, not only of the Covenant, but of the Peace Treaties in which it is embodied, viz. the Mandate system before referred to as the special contribution of General Smuts to the framework of the peace settlement. It can hardly be described strictly as part of the Organization of the League, though it is clearly foreshadowed in Article XXII of the Covenant. But the Council, as its guardian spirit, charged with the appointment of a permanent Commission to receive, examine, and criticize its working, necessarily brings it into close touch with the League.

Article XXII of the Covenant contemplates that to those colonies and territories which, as a consequence of the late War, have ceased to be under the "sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world," should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization under securities embodied in the Covenant. The Covenant does not itself provide for the allocation of such countries, but it contemplates that they shall fall into three groups, to which the titles of "A," "B," "C," respectively have since been popularly attached.

The first of these is a group, formerly belonging to the Turkish Empire, which have reached a stage where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance, until such time as they are able to stand alone. The second, of which the peoples of Central Africa are given as an example, need a Mandatory which must be responsible for the administration of its territory under conditions which will guarantee freedom of conscience and religion, the prohibition of abuses such as the slave trade, the arms traffic and liquor traffic, and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes and the defence of (? their own) territory, and will also secure equal opportunities for the trade and commerce of other[1] Members of the League. The third group, of which South-West Africa and certain of the South Pacific Islands are indicated as examples, can best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

It will be observed, as has been remarked, that the Covenant does not itself allocate the various Mandates among the Mandatory Powers. This was left, according to long-established practice, to the victorious Powers, which divided them among themselves, grouping under Class A, Palestine and Transjordan, Syria, and Lebanon, under Class B, Tanganyika, Ruanda-Urundi, Cameroons, and Togoland, and under Class C, South-West Africa. New Guinea, Samoa, and Nauru.[2]

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[1] Here "other" presumably means other than the Mandatory

[2] The distribution ultimately adopted was: Great Britain (Tanganyika, Cameroons, part of Togoland, Palestine, and Transjordan), France (part of Togoland and Cameroons, and Syria), Belgium (Ruanda), Union of South Africa (South-West Africa), New Zealand (Samoa), Australia (North-West Pacific Islands and Nauru), Japan (Marshall Islands).

Article XXII of the Covenant and its execution may, in the long run, prove the most important of the changes effected under the auspices of the League. It is true that the old principle has been followed, to the extent that the Mandated Territories were made the spoils of victory in war, and that the defeated Powers have been deprived of all present control over them But they have not been handed over to the victorious Powers in absolute ownership or "sovereignty." It is natural, though not, in view of their own often expressed principles, logical, that the defeated Powers should have put in claims for their return. But the new system has struck a heavy blow at the anarchic doctrine of sovereignty; and it is to be hoped that, whatever be the result of the claims, the Mandated Territories will never be placed again under that doctrine, except as independent States.[1] No single person or Government can safely be trusted with an unlimited supply of what has been well called, as has been before remarked, the "poison of power"; and, whatever the weaknesses of the Covenant, it stands out in this respect as a landmark on the path of progress. It is almost a libel on the brute creation to write of its habits as the Law of the Jungle, because, as we have seen, unlimited and systematic violence at the expense of other groups is by no means a universal feature of the animal kingdom, in fact quite the contrary. In fact, so far as observation goes, there is no evidence of any animal community setting out on a deliberate career of unlimited conquest, still less of taking any particular pride in violence for the sake of violence. In 1939 it was at least a widely spread fear that within the next few years such a career of violence might be launched on the so-called civilized world. It was permissible to hope that this fear, the fulfilment of which would be something like the suicide of humanity, was exaggerated Unfortunately it was not, as the devastation of World War II demonstrated. That

[1] Iraq achieved, with the full consent of the Mandatory, Membership of the League as a self-governing State in 1932

privilege is reserved for the superior mind of Man, with the unlimited resources of science at his disposal.

Perhaps the best justification then, for the appearance of this book is the reflection that, but for the existence of the state, such a catastrophe could never have taken place. The number of individuals who would consciously strive to bring it about must be comparatively insignificant. The number of those who could possibly bring it about except through an organised state must be even less. The trouble is, that the machinery is still to hand which almost any madman may set going on its fatal course.

CHAPTER XII

The State and Its Neighbours. II

THE League of Nations Assembly, at its session in 1939, adopted resolutions which made it possible to maintain the existence of the League and the International Labour Organisation in the event of a world war, and in fact the League was not dissolved until 1946, by which time the international organisation which replaced it was already in being.

The term "United Nations" was first used by President Roosevelt and Mr Churchill shortly after Pearl Harbour, partly in the hope that by substituting "United Nations" for the military term "Allies," the countries engaged in fighting the Axis would be able to go ahead with plans for continued co-operation after the war. The first definite step towards the creation of the United Nations organisation was taken at the conference of foreign ministers in Moscow late in 1943, when the Moscow Declaration was signed, stating in its fourth article that "... the four Powers" (the U.S.A. the U S S R., Great Britain and China) "recognise the necessity of establishing at the earliest practicable date a general international organisation based on the principle of the sovereign equality of all peace-loving states, large and small, for the maintenance of international peace and security." Representatives of the four Great Powers then met the following year at Dumbarton Oaks near Washington to draw up a detailed plan as a basis for discussion of the new organisation

Finally, a conference was held at San Francisco in 1945 at which 50 nations, forming the original members of the United Nations, agreed on a constitution or Charter for the organisation. In this Charter the purposes of the organisation are stated to be: the maintenance of peace and security by the prevention of all threats to, or breaches of, the peace, and by the peaceful settlement of disputes; the development of friendly international relations on the basis of self-determination of peoples; and co-operation in solving economic and social problems and in encouraging respect for human rights and fundamental freedom for all.

THE GENERAL ASSEMBLY

The Charter places the General Assembly in a central position in the structure of United Nations, but it is not the supreme authority. The Security Council, for instance, is not bound to accept the Assembly's recommendations, and is in fact granted an exclusive right of action in security matters; and the International Court of Justice has the usual independence of any judicial body.

In the Assembly each member state has one vote. Important decisions require a two-thirds majority of those voting; other questions a simple majority. In matters which are the sole concern of the Assembly each small state carries as much weight as any Great Power. These provisions are a distinct advance towards the equality of small nations as compared with those of the League.

The Assembly maintains exclusive control over finance, trusteeship and economic and social co-operation. In financial matters, it considers and approves the budget, apportions the total expenses between member states and may examine the administrative budgets of the "Specialised Agencies" such as United Nations Educational Scientific and Cultural Organisation or International Labour Office.

In Trusteeship matters, the Trusteeship Council operates under the authority of the General Assembly in its duties of supervising the administration of the Trust Territories. The Assembly is responsible for electing to the Trusteeship Council such members as are not automatically entitled to membership; it receives annual reports from each trusteeship authority, and it is empowered to accept petitions from the peoples of the trust territories, to inspect the territories and to authorise the Trusteeship Council to take similar action.

In the field of economic and social co-operation, the Assembly is responsible for discharging the United Nations' responsibilities, and the Economic and Social Council operates under the Assembly's authority. The Assembly elects all the members of the Economic and Social Council and the Council must submit any conventions and agreements which it makes with the Specialised Agencies for the Assembly's approval. With regard to trusteeship and economic and social work, it is notable that the Assembly, despite its vast responsibilities, has no effective powers of enforcement. The Charter forbids the United Nations to intervene in the domestic affairs of any state, and the Assembly could only attempt to enforce its policies by threat of expulsion—which it cannot carry out without a recommendation from the Security Council.

The powers shared by the Assembly and the Security Council concern all matters regarding membership of the organisation (in which any action must be initiated by the Council), the election of judges to the International Court; the election of the Secretary-General; and the amendment of the Charter. (This latter power is shared between the Assembly and only the five permanent members of the Council) So far as international security is concerned, the Assembly is empowered to receive and consider reports from the Council. It may discuss and make representations to the Council

regarding situations dangerous to peace or security provided the situation is not already under consideration by the Council, but it cannot take any action itself.

The Assembly meets in regular annual sessions and in any special sessions which may be required. Requests and proposals are referred first to one of a set of committees which dispose of much of the detailed discussion and forward recommendations agreed on by a simple majority to the Assembly for approval or amendment.

It is interesting to note the resemblances and differences between the powers of the Assemblies of the United Nations and the League. The League Assembly shared with its Council the appointment of the Secretary-General and the Permanent Court; it could vote amendments to the Covenant; it had exclusive control of finance, and it elected some of the members of its Council, just as the United Nations Assembly does. In the United Nations, however, the Assembly and the Council share the power of admission and expulsion, whereas in the League the Assembly admitted and the Council expelled, and the trusteeship territories (which are roughly equivalent to the League's mandates system) are the concern of the Assembly and not, as in the League, of the Council.

THE SECURITY COUNCIL

The Security Council is a small body consisting of the representatives of eleven member nations of the ...ited Nations which is charged with "primary ...tensibility for the maintenance of international peace ...ancial...rity." The Council's qualifications for effective ...apportions...inst threats to the peace, are, on paper at any ...and may exact advance on those of the League For ..." Specialised ... the League Council, it sits permanently ...Educational Sc...action in an emergency, it can itself ...International Labour in reviewing a dangerous situation.

or can do so at the request of the Secretary-General; it can take action before war has actually broken out; and if war has been declared, it can act whether the Charter has been violated or not

There are various methods which the Council may recommend to settle a dispute—arbitration, judgment by the International Court, a decision by the Council itself, and non-military or military force applied by member states, according to the nature or gravity of the situation The Charter lays much more positive stress on the use of armed force to prevent aggression than the Covenant did, and the Security Council has established a Military Staff Committee (consisting of the representatives of the Chiefs of Staff of China, France, the USSR, the USA and the U.K) to provide it with expert advice on this problem. In 1946 the Military Staff Committee was directed to prepare military agreements setting out the nature and size of the armed forces which the member states were to be asked to place at the United Nations' disposal, and it is unfortunate that, owing largely to Russian fears and objections, the committee has not so far been able to make much progress with this task.

Although the Security Council has been given these tremendous powers in dealing with threats to the peace, the Charter makes it clear that the right of a nation to individual or collective self-defence is not impaired, though such measures must be reported to the Council and must cease once the Council has restored international security.

In order to achieve unity of action against aggression, the membership of the Council has been carefully planned to consist of the "Big Five" as permanent members, and six non-permanent members who are elected for a two year term and who represent a fair geographical distribution of seats (that is, one member from Africa and the Middle East, one from the Pacific

and Far East, and so on.) Thus the small members possess a clear majority in the Council, but this is balanced by the provision of the much debated "Great Power veto."

In the Council, decisions on matters of procedure only need an affirmative vote of any seven members. But decisions on the settlement of disputes by peaceful means need an affirmative vote of seven members including all five permanent members—that is, the permanent members can use the veto, provided that they are not a party to the dispute. (If they are a party to the dispute, they cannot vote at all.) And in decisions which involve action to deal with peace-breaking, each Great Power can use the veto whether it is a party to the dispute or not. As can be seen, the provisions for the veto's use are extremely complicated, but they are a realistic concession to the importance of unity in the Council's decisions and for the moment it is difficult to see how the Great Powers and particularly Russia could be persuaded to co-operate without them. Indeed by the end of 1948, the Russians had used the veto twenty-nine times and the French once to block resolutions which obtained seven or more affirmative votes from other members. It should be noted that the right of veto covers all the powers, mentioned previously, which the Council shares with the Assembly.

Two other important organisations which, with the Military Staff Committee, were set up to advise the Security Council, are the Atomic Energy Commission and the Commission on Conventional Armaments, the first to deal with "the problems raised by the discovery of atomic energy and other related matters" in both their peaceful and military aspects and the second to draw up plans for the reduction of armaments and for safeguards to protect co-operating nations against other nations which might violate any general agreement made. Both Commissions are composed of one representative of each

member of the Security Council, with the addition, in the case of the Atomic Energy Commission, of Canada (as a result of her partnership with the United States and Britain in the pioneer work on atomic energy carried out during the war).

Unfortunately, the deliberations of both bodies are at present in the same state of deadlock as are those of the Military Staff Committee In the case of the Atomic Energy Commission the deadlock arose because Russia objected to the plan put forward by the American delegate for an international authority to control atomic power, on the ground that it would involve the inspection of all potential sources of atomic energy on the territory of member states, and the other members of the Commission could not agree to the Soviet counter-proposal because it provided no effective means either for the detection of clandestine activities or for prompt and effective enforcement action. So far as the Commission on Conventional Armaments is concerned, all its members were agreed that the reduction of armaments and armed forces in all countries was vitally necessary, but the U S S R could not agree that United Nations officials should supervise disarmament to ensure its actual carrying out.

THE INTERNATIONAL COURT OF JUSTICE

The Charter declares that "the International Court of Justice shall be the principal judicial organ of the United Nations", and that it should function in accordance with a Statute which forms an integral part of the Charter. But it also implicitly recognises the continued validity of other international courts (such as the Hague Tribunal which was set up by the principal nations of Europe and America in 1907 to consider international disputes and which has been functioning

transmit to the Secretary-General information about economic, social and educational (but not political) conditions in their dependencies. Thus the principle of trusteeship is recognised for all dependent peoples; but the actual trusteeship system is concerned only with a small category of trust territories, and the Trusteeship Council has no responsibility for, or authority over, colonial areas in general.

The League of Nations mandates system has been described in the previous chapter. The United Nations trusteeship system, although wider in scope, is in some ways less complicated than was that of the League. There is, for instance, no classification of territories according to the stage of their political and social development, although provision is made for territories which are specified as "strategic areas" to be supervised by the Security Council rather than by the Trusteeship Council.

All other trust territories, which may be former League mandates, areas taken from the defeated Axis nations or other territories, are declared Trust Territories by individual agreements made with the Trusteeship Council and approved by the General Assembly. The Council is a subordinate organ of the General Assembly and it has a somewhat complicated membership. The Big Five are automatically members; and so are all the trustee nations. The Assembly elects in addition enough temporary members to make the balance between trustee and non-trustee nations exactly even. The Council is not hampered by a veto rule, but can take decisions by a simple majority. It has, however, no direct authority over the trust territories. Both it and the Assembly may receive petitions from the peoples of the territories, and they may arrange visits of inspection to them; but the real authorities over the territories are the trustee nations concerned who administer them and only have to report to the Council and the Assembly once a year on the discharge of their duties.

The present trust territories are. North-East New Guinea, administered by Australia; Ruanda Urundi, administered by Belgium; French Togoland and the French Cameroons, administered by France, Western Samoa, administered by New Zealand; Tanganyika, British Togoland and the British Cameroons, administered by the United Kingdom; Nauru, administered by Australia on behalf of New Zealand, the United Kingdom and Australia; and the "strategic area" of the former Japanese mandated islands, administered by the United States. Thus all previously mandated territories which have not already achieved independence have now been placed under the Trusteeship system, with the exception of South-West Africa.

The non-trustee nations at present serving on the Council are Iraq, Mexico, the Philippines and Costa Rica

THE ECONOMIC AND SOCIAL AGENCIES

During the short period in which the United Nations has been at work, the greatest practical advance in international co-operation has been made in the economic and social fields Chapter IX of the Charter sets out the following aims "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote (*a*) higher standards of living, full employment, and conditions of economic and social progress and development, (*b*) solutions of international economic, social, health and related problems, and international and cultural educational co-operation, (*c*) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"

This is an almost entirely new development. The League Covenant merely bound member states to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children"—a clause which led to the creation of the International Labour Organisation which did excellent work in the years between the wars, but in a limited field.

THE ECONOMIC AND SOCIAL COUNCIL

The Economic and Social Council operates under the authority of the General Assembly mainly as the co-ordinator of all the work which is being done in the economic and social sphere by its subsidiary bodies and the "specialised agencies." It consists of 18 members of the United Nations elected by the General Assembly, 6 elected every year to serve a three-year term. Each member of the Council has one representative and one vote, and the Council takes its decisions by a simple majority. It makes recommendations to the member nations or to the specialised agencies about economic, social, cultural, educational, health, human rights and related matters; it prepares draft conventions for submission to the Assembly on all these subjects, and it convenes international conferences on economic and social matters.

The Council has made separate agreements with each of the Specialised Agencies defining the relationship between the agencies and the United Nations; and it is responsible for the co-ordination of their activities It can obtain reports from both member states and the agencies on the steps which they have taken to carry out its recommendations and those of the Assembly; and it prepares reports and initiates studies in all social and economic fields. Normally it meets three times a year.

COMMISSIONS OF THE COUNCIL

Article 68 of the Charter directs that the Council "shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." There are two types of Commissions, functional and regional The first class deals with Economics and Employment, Transport and Communications, Statistics, Human Rights, Social Affairs, the Status of Women, Narcotic Drugs, Fiscal Matters and Population The members of each of these Commissions vary in number from twelve to eighteen The second class consists of Economic Commissions for Europe (with 18 members), for Asia and the Far East (with 12 members) and for Latin America (with 25 members)

The work which most of these Commissions carry out is largely explained in their titles, and lack of space precludes consideration of them all individually, but mention should be made of the work of one of the most active and widely known In December, 1948, a Universal Declaration of Human Rights laying down the basic rights of an individual in modern society was approved by 48 votes in the Assembly with eight abstentions (the six east European Countries, South Africa and Saudi Arabia) The Declaration represents over two years of intensive study and work, mainly on the part of the Human Rights Commission, and it marks the first time in history that a document of such magnitude in this field has been agreed on by an international organisation. It is, however, unfortunately true that the Declaration does not commit the countries subscribing to it to action It is merely a statement of aspirations, a first step towards the infinitely more difficult task of drawing up a Covenant (which will be binding on those states adhering to it) and Measures for Implementation, upon both of which work in the Human Rights Commission has now begun.

THE SPECIALISED AGENCIES

There are at present ten Specialised Agencies and three Preparatory Commissions. With the exception of the International Bank and Fund, all the agencies are structurally similar. Their functions are carried out by three bodies—a Conference or Assembly composed of national representatives with one vote for each member nation, which is the policy making body and generally meets annually; an Executive or Council which is responsible for implementing policy; and a Secretariat.

The International Labour Organisation is the only agency which was established before the second world war. It came into existence in 1919 as part of the framework of the League of Nations, but its constitution has now been amended so as to eliminate any links with its parent organisation, and a formal agreement establishing relationship between the International Labour Office and the United Nations was concluded in 1947. The main task of the International Labour Office is to frame international rules on conditions of labour, to persuade governments to accept these rules, and to supervise their application. By the end of 1948, 56 such conventions were actually in force and over 900 individual ratifications had been obtained.

The Food and Agriculture Organisation was the first of the new permanent United Nations organisations launched after the recent war. One of its chief activities in the first post-war years has been the allocation of scarce foodstuffs between countries, and over 90 per cent. of its recommendations in this connection have been fully carried out. The Food and Agriculture Organisation executive, the World Food Council, is a small body of 18 representatives of member nations covering all regions of the world, which works directly and continuously with member governments. The Council's powers are mainly of an advisory nature, but it is strengthened

by the fact that the representatives on it can speak for their governments. Technical assistance has already been given to several member states by the Food and Agriculture Organisation missions; advanced scientific techniques have been promoted; and various irrigation, insect control and food preservation projects are under way in Europe and the Far East.

The purpose of the United Nations Educational, Scientific and Cultural Organisation, as defined in its constitution, is to contribute to peace and security through education, science and culture. To this end, it is amongst other activities supplying the devastated countries of Europe and the Far East with educational material, books and scientific and technical equipment; conducting experimental projects on fundamental education and in scientific studies in various parts of the world, and has established many international scholarships and fellowships to encourage study abroad

The constitution of the World Health Organisation is prefaced by the statement that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." This belief has led to the formation of expert committees and the sending out of medical missions to improve environmental hygiene, child and maternity care, as well as to carry out more positive preventive and curative work against scourges such as malaria, tuberculosis and venereal disease. In Greece, for example, the World Health Organisation has reduced the yearly incidence of malaria from one million to fifty thousand cases

The International Civil Aviation Organisation, which has been at work since 1945, has already done valuable work in initiating agreements with member states for the development of navigation facilities and safety services in the air and the simplification of border formalities on the ground

The International Bank and the International Monetary

Fund were set up to assist in bringing about the world's smooth transition from a war-time to a peace-time economy. By January, 1949, the Bank had made loans totalling 630 million dollar, to member countries to help finance reconstruction and economic development; and up to the same date the Fund had sold scarce currencies to its members to a total of 675 million dollars, and had sent missions to over 30 member countries to advise on budgetary reform, credit controls and exchange measures.

The latest agency to come into being is the International Refugee Organisation which has now taken up the work for refugees and displaced persons initiated by the United Nations Relief and Rehabilitation Administration. The International Refugee Organisation differs from the other Specialised Agencies in that it hopes to complete its work by 1950. It is concerned with the identification, registration and classification of refugees; their care and assistance, legal and political protection; their transport; and their repatriation or resettlement in countries able and willing to receive them. Between July, 1947, and January, 1949, 414,600 refugees were repatriated or resettled, but about 514,000 have still to be provided for.

The reader may feel that overmuch space has been devoted to outlining the organisation and structure of the United Nations in comparison with that given in the previous chapter to the League. It should, however, now be clear that the new organisation's duties and responsibilities are much more numerous and varied than were those of its predecessor. As has been shown, the United Nations differs from the League in two important ways. It is, in intention at any rate, "a League with teeth"; and it has assumed new and vast responsibilities in the almost limitless field of economic and social affairs. In this latter sphere of activity, the prospect is promising, particularly since, although the U.S.S.R. does not now belong to any of the Specialised

Agencies, many of the other eastern European countries do—for instance, Czechoslovakia, Poland, Hungary, Yugoslavia, Albania and Bulgaria belong to one or more of all the agencies previously mentioned

Before we leave this aspect of United Nations' work however, a word of warning should be added The organisation is in some danger of falling into disrepute through its tendency to dissipate time and energy on the production of declarations and conventions which are divorced from reality. The Declaration of Human Rights, which has already been mentioned, is a case where it would have been better to have concentrated from the outset on securing a convention, which is binding on its signatories, rather than a declaration, which is not It may not be a bad thing to define an ideal but it should neither be done at the expense of more practical work nor mistaken for it. Real progress in international co-operation cannot be made on paper.

It is also well to remember that there can be no lasting economic or social progress without peace; and here the outlook is much less re-assuring. True, the majority of nations have, for the first time in the history of the world, accepted the principle that peace can only be ensured by some kind of supra-national authority which directly controls authorised power on their behalf, and that some kind of international inspection is necessary to enforce disarmament But they have not been prepared so far to make the sacrifices necessary to put their principles into practice, and until they do so, the United Nations will fail in the purpose for which it was established

The majority of members of the organisation recognise this fact, and several attempts have been made to break the deadlock by proposals for limiting or even abandoning the veto, which has undoubtedly been the chief weapon used to frustrate multilateral disarmament, the control of atomic energy and the pro-

vision of an international police force. These attempts have however proved abortive. Meantime the western democracies have taken what might be termed "the easy way out" by turning the bulk of their energies to plans for a western European Union and a complementary Atlantic Pact, a defensive alliance designed to prevent the outbreak of war. These are admirable conceptions, but they are not a solution to the problem of international co-operation. They can, however, create an atmosphere of security in which we must hope that the United Nations will make an honest and wholehearted attempt to secure a positive and lasting peace. With atomic energy now loose in the world, there is a real possibility that this may be humanity's last chance.

INDEX